CONTENTS

Answering brief on petition for certiorari 11
Brief on motion to dismiss petition 2
Certificate of Clerk C. C. of Appeals 5
Memorandum, re bonds upon certiorari 8

INDEX TO BRIEFS

ACTIONS, character of 19, 61
ADVERSE POSSESSION ..... 56 et seq.
- Citation of cases by petitioners considered 62
- Effect of limitations under U. S. Rev. Stat., Sec. 2332 62
- Effect of Nev. Stat., Sec. 4951 59
- Issues as to 56
- Long continued possession 60
- Mining operations 67
- Opinions of the judges 66

BURDEN on petitioners to show error in judgment 12, 51
CERTIORARI, no ground shown for 1–3, 69
COMPLAINT—
- Insufficiency of 16
- Burden of allegation and proof 17–18
- Ouster or detention 19
- Vacancy, unoccupancy, unappropriation 16

CONFLICT of decisions 46–50
CROSS-EXAMINATION excluded 41, 43, 44
DISCOVERY of mineral. (See "Lodes and Veins.")
- Included in term "valid location" 51, 57
- Issue as to 61
- Original mineral discoveries 53
- Subsequent discoveries 53, 56
- Testimony as to 53

ESTOPPEL to dispute validity of the lode claims 14
EVIDENCE—
- Actual possession 21
- For petitioners as to lodes or veins 29
- Prior placer discovery by respondent 20
  - Knowledge thereof by petitioners 20
- Priority of location and possession by respondent 19, 21, 22
- Open cuts, shafts, tunnel, etc 21
- Ouster or detention, none 28
- Vacancy or occupancy 19, 28
- Working and improvement 20–21

INDEX to Exhibit A. (See Ex. A., pp. 779-794).

ISSUES—
Relative priority of location....19, 30
Adverse possession 56
Lodes and veins.... 45
JUDGMENT, not reversible where right on whole record.... 11
LODES AND VEINS—
Conclusions of witnesses.... 35
Cross-examination as to 32, 41, 43, 44
Evidence as to, rules of....37–39, 41, 46
Exceptions as to....40, 41
Exclusion of testimony....32–33
Issues as to.... 45
"Lodes and veins" judicially defined....32, 42, 43, 45, 55
Mineral indications 36
Mineralization 28–29, 31
Mining operations 67
Objections to testimony as to.... 32
Prudence, judgment and discrimination.... 35
Pay ore 34–35, 43
Petitioners' case as to....29–45
Photographs of 41
Physical characteristics 37
Presumptions of discovery....46, 52
From recorded location notice.... 46
From actual possession....50, 60
Respondent's case as to.... 45
Samples and assays....31, 34, 42
Surface indications 37
MISJOINDER of plaintiffs.... 13
NOTICE—
Of location 46
Of relocation 14
OPINIONS of the judges....23, 58, 61, 66
Dissenting 58, 61
POSSESSION—
Effect of prior actual....19, 27, 60
Cases upon cited, applied and distguinshed....23–26
Facts as to.... 29
Priority of location and....30, 50
Issue as to....19, 30
PRELIMINARY OBSERVATIONS 11
RELOCATION—
Legal effect of.... 14
Estoppel to dispute validity.... 14
REVENUE STAMPS 13
STATUTES—
U. S. 13
U. S. Rev. Stat. 48, 56, 59
Nevada 47, 59
TABLE OF CASES in Exhibit A. (Ex. A., pp. 795-811).

TITLE to Junior Locations—
Petitioners have none 13
Effect of none 15
TRESPASS, no rights by 17
VERDICT—
Sufficiency of evidence to support 40
Question for the court preliminarily 40
(For Index to Exhibit A, see Ex. A., pp. 779-794).

TABLE OF CASES CITED.

American Cons. Co. vs. Ry. Co., 148 U. S. 372; 37 L. Ed. 486 . 3, 70
Bank vs. Willingham, 213 Fed. 219 12
Belk vs. Meagher, 104 U. S. 279-89; 26 L. Ed. 735 . . 15, 17, 25, 63
Brown vs. Gurney, 201 U. S. 184; 50 L. Ed. 717 15
Book vs. Justice Min. Co., 58 Fed. 106, 121-128 35
Buffalo, Etc., vs. Crump, 69 S. W. 572-6 46
Bevis vs. Markland, 130 Fed. 226 46
Bismark Min. Co. vs. Min. Co., 95 Pac. 14-18 47
Consolidated Oil Co. vs. U. S., 245 Fed. 521 23
Cosmos vs. Oil Co., 112 Fed. 14 26
Chrisman vs. Miller, 197 U. S. 313-332 35
Cheeseman vs. Hart, 42 Fed. 98 ..... 39, 46
Clark Montana Realty Co. vs. Ferguson, 218 Fed. 959 39
Coughran vs. Bigelow, 164 U. S. 308; 41 L. Ed. 446 40
Cheeseman vs. Shreeve, 40 Fed. 791 46
Campbell vs. Rankin, 99 U. S. 261; 25 L. Ed. 435 . . 19, 50, 51, 60
Creede C. C. & M. Co. vs. Uinta T. M. & T. Co., 196 U. S. 353-4, 49 L. Ed. 510, Col. 2 ..... 51, 57
Corpus Jur., page 663, and cases Note 92 12
Denne vs. Ridpath, 38 Sup. Ct. Rep. 826 23
Dev. Co. vs. Olmstead, 103 Fed. 573 26
Evans vs. Glass Co., 83 Fed. 706 12
Ely Min. Co. vs. Clipper Min. Co., 194 U. S. 220-30 ..... 17, 25
Erhart vs. Boaro, 113 U. S. 527 49
Forsythe vs. Hammond, 166 U. S. 506 3
Fields vs. U. S., 205 U. S. 292; 51 L. Ed. 807 ..... 3, 71
Ferris vs. McNalley, 121 Pac. 889-893 16
Fox vs. Myers, 29 Nev.; 86 Pac. 793 43
Gibson vs. Hjul, 32 Nev. 360; 108 Pac. 759-61 48
Healey vs. Rupp, 86 Pac. 1015-1019 16
Hammer vs. Min. Co., 8 Pac. (Mont.) 153 ..... 17, 47
Harris vs. Min. Co., 8 Fed. 863 46
Humphreys vs. Idaho G. M. D. Co., 120 Pac. 823, 826-7 63
Iron S. Min. Co. vs. M. & S. Min. Co., 143 U. S. 404; 36 L. Ed. 204 56
Jantzen vs. Copper Co., 20 Pac. 93 46
Lau Ow Bew vs. U. S., 114 U. S. 47; 36 L. Ed. 340 2
Low Au Bew, Ex Parte, 141 U. S. 583; 35 L. Ed. 868 2
Lavagnino vs. Uhlig, 71 Pac. 1046-9 ..... 16, 65
Lalande vs. McDonald, 13 Pac. 347; 80 Pac. 139; 74 Pac. 461; 65 Pac. 633; 82 Pac. 538 16

Lockhart vs. Farrell, 86 Pac. 1077; 210 U. S. 141-148; 52 L. Ed. 992 17–18
Lyle vs. Patterson, 33 Sup. Ct. Rep. 480; 228 U. S. 211 23
Lindley on Mines, Sec. 892 (3d Ed.) 46
Lebanon Min. Co. vs. Min. Co., 6 Colo. 271-2 51
McClung vs. Silliman, 6 Wheat. 598; 5 L. Ed. 340 ..... 12, 35
Min. Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712-14 ..... 32, 35, 43, 55
McCowan vs. McLay, 16 Mont. 234; 40 Pac. 602 62
Nevada Statutes, Secs. 2422, 2424, 4951 ..... 47, 56, 59
Oil Co. vs. U. S., 245 Fed. 521 63
Penn. R. Co. vs. R. R. Co., 157 U. S. 225; 39 L. Ed. 682 12
Patchen vs. Keeley, 19 Nev. 404; 14 Pac. 347 15
Perego vs. Dodge, 16 Sup. Ct. Rep. 971-4; 163 U. S. 160 52
Reavis vs. Fianza, 215 U. S. 16 ..... 17, 57, 63, 65
Russell vs. Hoyt, 2 Pac. 95 18
Rd. Mtn. Min. Co. vs. Min. Co., 36 Nev.; 138 Pac. 71 48
Ralph vs. Cole, 249 Fed. 80 66
Sparks vs. Pierce, 115 U. S. 408, 413; 6 Sup. Ct. 102 24
Southern Cross Min. Co. vs. Min. Co., 15 Nev. 383 ..... 39, 46, 49
Strepy vs. Clark, 7 Colo. 614 47
Snyder on Mines, Sec. 349 56
Three Friends, 166 U. S. 1; 41 L. Ed. 897 3
U. S. vs. Rimer, 220 U. S. 547; 56 L. Ed. 578 3
U. S. vs. Dickinson, 213 U. S. 92; 53 L. Ed. 711 3
U. S. Rev. Stat., Sec. 2332 56
Vogel vs. Warsing, 146 Fed. 950 46
Woods, in re, 143 U. S. 114; 36 L. Ed. 340 ..... 2, 70
Wills vs. Blain (N. M.) 20 Pac. 798 15
Willison vs. Ringwood, 190 Fed. 549 18
Walton vs. Min. Co., 123 Fed. 209 59
Zeres vs. Vanina, 150 Fed. 564; 134 Fed. 610-14 15

(For table of cases cited in Brief, Exhibit "A," see Exhibit "A," pages 795-811).

No._____

In the Supreme Court of the United States

GEORGE A. COLE, ED. MALLEY, GILBERT C. ROSS, J. J. HEALEY, GUY DAVIS, GEORGE B. THATCHER, and WILLIAM FORMAN,
Petitioners,

vs.

JOSEPH RALPH, *Respondent.*

Ct. Court of Appeals No. 2952.

Involving the Claims of Petitioners to the Guy Davis Mining Claim as Against the Respondent to the Salt Lake No. 3.

BRIEF FOR RESPONDENT

AND MOTION TO DISMISS PETITION FOR CERTIORARI.

Comes the Respondent above named and moves the Court to dismiss the petition for a writ of certiorari herein, upon the following grounds, to wit:

(a) This action is not one wherein the judgment or decree of a United States Circuit Court of Appeals can be re-examined in this Court upon certiorari.

(b) The judgment of the U. S. Circuit Court of Appeals for the Ninth Circuit complained of does not involve any question of peculiar gravity or general importance, within the decisions of this Court.

(c) Said judgment does not involve or affect any public treaty or relations with any foreign government.

(d) There is no lack of uniformity of decisions involved, but the judgment complained of is in strict accord with the decisions of this Court and of the highest courts of the mining states.

(e) Certiorari cannot independently be used to supply the office or purpose of an appeal or writ of error, for the correction of alleged errors of no general interest or importance.

(f) The petition is manifestly frivolous and intended for delay.

(g) Because the petitioners have not filed with their petition for the writ a certified copy of the entire record of this case including the proceedings in the Court to which the writ is asked to be directed, as required by Rule 37 Sec. 3 of this Court.

(h) Because no error in the judgment below is shown by the petition.

PAUL G. ELLIS,
EDWIN W. SENIOR,
Attorneys for Respondent.

BRIEF ON MOTION.

(a, b, c, d) Jurisdiction to review by certiorari is exercised sparingly, with great caution, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions.

Ex Parte Low Au Bew, 141 U. S. 583; 35 L. Ed. 868.

In re Woods, 143 U. S. 202; 36 L. Ed. 125.

Lau Ow Bew, vs. U. S. 114 U. S. 47; 36 L. Ed. 340.

American Cons. Co. vs. Ry. Co., 148 U. S. 372; 37 L. Ed. 486.
Three Friends, 166 U. S. 1; 41 L. Ed. 897.
Forsythe vs. Hammond, 166 U. S. 506.
Fields vs. U. S., 205 U. S. 292; 51 L. Ed. 807.
U. S. vs. Rimer, 220 U. S. 547; 55 L. Ed. 578.

(e,f) Certiorari cannot independently be used as a process for the correction of alleged errors of no general importance or concern, and has not the scope or purpose of an appeal or writ of error for that purpose.

U. S. vs. Dickinson, 213, U. S. 92; 53 L. Ed. 711.
Am. Const. Co. vs. Ry. Co., 148 U. S. 372; 37 L. Ed. 486.

(g) (See certificate of the Clerk of the Court of Appeals below).

No copy of the certified record filed here with the petition has been received by Respondent. We are informed by the Clerk of this Court that the record as filed consists of "three large printed volumes in each case." These are no doubt copies of the same printed volumes in each case prepared by the Clerk of the Court of Appeals under the rules of that court, which contains the proceedings in the trial Court. If they contain nothing more, they do not comply with Rule 37, Sec. 3 of this Court, which requires in addition all the proceedings in the Court to which the writ is asked to be directed. Whether the "judgment" itself of the Court of Appeals, besides its opinion, and its order upon petition for rehearing are among the printed records lodged in this Court, can only be determined by inspection. Subsequent to the rehearing petition and order, there were other proceedings a memo outline of which appears in the Clerk's certificate herewith. While those matters do not bear upon the errors alleged in the petition here for the writ of certiorari, some of them are pertinent

especially in connection with the amount of bond to be required in case this Court should grant the writ prayed for. So far as appears to the writer, the amount adjudged to Respondent as costs in the Court of Appeals does not appear in the record.

(h) As to this ground, see main brief.

PAUL G. ELLIS,
EDWIN W. SENIOR,
Attorneys for Respondent.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

JOSEPH RALPH, *Plaintiff in Error and Appellant,*

vs.

GEORGE A. COLE, ED. MALLEY, GILBERT C. ROSS, J. J. HEALEY, GUY DAVIS, GEORGE B. THATCHER and WILLIAM FORMAN.
Defendants in Error and Appellees.

Nos. 2952 and 2953

Clerk's Certificate

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit do hereby certify that the following proceedings and papers were duly entered and filed in the above entitled cause as hereinafter stated:

That on April 3, 1918, Petition on behalf of the defendants in error for a rehearing was filed in each of said causes:

That on May 13, 1918, an order was entered by above-entitled court denying each of said petitions;

That on May 16, 1918, upon application made on behalf of counsel for the defendants in error, an order was entered staying the Mandate of this Court under Rule 32 in each of the above-entitled causes until the Petition to be made on behalf of the Defendants in Error to the Supreme Court of the United States in each of the said causes be disposed of, on condition that said Petition be filed and docketed in said Supreme Court within thirty (30) days and agreeably to the Rules of said Supreme Court;

That on May 27, 1918, the said Plaintiff in error filed a motion in each of said causes to vacate or modify

the said order entered on May 16, 1918 so as to require the Defendants in error to give security or stay bonds as a condition of said stay;

That on June 5, 1918, an order was duly entered by this Court in each of said causes granting the motion of the Plaintiff in error filed on May 27, 1918 and requiring the defendants in error to file stay bonds within (10) days in the penal sum of $3,500.00 in each of said causes, or that the Mandate of this Court under Rule 32 in each of said causes should issue to the District Court for the District of Nevada;

That on June 13, 1918, a motion was filed by the defendants in error for the retaxation of costs in eacn of said causes;

That on June 26, 1918, Plaintiff in error filed a motion for the issuance of the Mandate in each of said causes forthwith, on the ground that the order of this court entered on June 5, 1918, had not been complied with;

That on July 12, 1918, an order was duly filed overruling the motion of the Defendants in error to re-tax the costs and granting motion of the Plaintiff in error for the issuance of the Mandate in each of said causes.

That on July 12, 1918, the Mandate of this Court under Rule 32 in each of the above-entitled causes was duly issued and forwarded to the clerk of the District Court for the District of Nevada;

I further certify that no security or stay bond of any nature has been made and filed in this Court in each of said causes by said Defendants in error in compliance with the order heretofore stated;

IN WITNESS WHEREOF I hereunto set my hand and the seal of the said the United States Circuit Court of Appeals of the Ninth Circuit, This 15th day of August, A. D. 1918.

F. D. MONCKTON, *Clerk.*

(SEAL) By PAUL P. O'BRIEN, *Deputy Clerk.*

(CAPTION SAME AS ON PAGE 1.)

To the Petitioners named in the caption and to Geo. B. Thatcher and William C. Prentiss, their attorneys:

You are hereby notified that on Monday, October 7, 1918, at the convening of the U. S. Supreme Court at the Court Room in Washington, D. C., at 12 o'clock noon, or as soon thereafter as counsel can be heard, we will submit the foregoing motion to dismiss your petition for the writ of certiorari in said action to the consideration of said Court.

PAUL G. ELLIS,
EDWIN W. SENIOR,
Attorneys for Respondent.

State of Utah,
Salt Lake County, } ss.

P. G. Ellis being duly sworn deposes and says that he duly served the foregoing motion, notice, brief and certificate, on the petitioners named therein on the 4th day of September, A. D. 1918, by enclosing a true copy thereof in a sealed envelope, postage prepaid, and addressed to George B. Thatcher, one of the attorneys for the petitioners, at his post office address of Carson City, Nevada, and by depositing the same in the U. S. Post Office at Salt Lake City, Utah. That between Salt Lake City and Carson City aforesaid there is a regular daily mail service and delivery by the Post Office Department.

P. G. ELLIS.

Subscribed and sworn to before me on this the 6th day of September, A. D. 1918. My commission expires December 21, 1921.

CORA M. HOLDERMAN,
Notary Public.

(Seal).

MEMORANDUM.

While we do not believe that this case is one in which the jurisdiction of the Court to review by certiorari can be invoked, nevertheless if the Court should entertain the petition we ask a hearing with leave to submit proofs by affidavits and judicial records for the purpose of informing the judgment and discretion of the Court with regard to the amount of certiorari or supersedeas bonds that should be required. The Court of Appeals required $3500 stay bonds in each case, in default of which the mandates issued returning the cases to the trial Court. But even these amounts, we contend, are insufficient because of the unusual conditions surrounding the property involved, which distinguish the case from ordinary actions where real estate is involved. In ordinary cases real property remains to answer for itself to the party to whom its title is adjudged and requires no security for its own forthcoming. But in a case where a considerable part of the substantial value of a piece of ground consists in its rich placer gold values which may be easily removed by a shaft sunk in close proximity to the property line, and from thence a tunnel under the line to where the rich values are in the trough of the Canyon, and where this means of access is owned, controlled and maintained by a party to the suit, a different question is presented. If leave is given to file proofs as above, we will show by the testimony of some of the petitioners that tens of thousands of dollars of placer values have disappeared unlawfully, since this suit has been pending, and notwithstanding the injunctions spoken of by petitioners on their page 1-2. And that the injunctions though granted against petitioners and their privies were made to operate also against respondent, but no injunction bonds were required. Meanwhile respondent is enjoined and prevented from working his property, while it has been

subjected to loss and depreciation without his consent and notwithstanding his greatest diligence and watchfulness. That efforts and requests by respondent to secure the abatement and destruction of the shaft and tunnel aforesaid have been refused and resisted by petitioners, and the same is still maintained and is a menace to the safety of the placer values while this litigation is protracted.

Under these circumstances a bond such as is required in ordinary cases of real property is not within the spirit and reason of Rule 29 of this Court, because it does not insure the forthcoming of the res or thing adjudged at the end of the suit. Rule 29 requires a bond in amount sufficient to secure the payment of the amount adjudged, or the forthcoming of the thing itself, where not otherwise sufficiently secured by bonds or property in the possession of the marshal.

The res in this case, insofar as it consists of the rich placer gold values, is not so secured. And the ultimate judgment of this Court which will carry the adjudged right of possession, cannot be secured by any arrangement or status quo, by which one party is left in possession or in a position to take possession of the thing in dispute in advance of the determination of the right. Not any more than a judgment for a bank account could be ultimately enforced, where one party has been left in position to check the money out pending the suit.

We do not intend however at this time to distract the Court's attention from the main inquiry as to whether there is reversible error in the record and as to whether the writ of certiorari is properly prayed. But, should the writ be awarded, we ask leave to submit these proofs; and deem proper and necessary to give this advance notice thereof. Should the hearing upon the petition for the writ be delayed so as in the judgment of this Court to make it proper that security be required while the petition is pending, we will submit said proofs whenever authorized to do so.

The jurisdiction to hear and to fix the amount of such bonds within the reason of Rule 29 of this Court is original, of course, and not appellate in respect of any errors below. And since the Court in determining the petition for the writ and fixing bond proceeds in the exercise of an independent jurisdiction to that invoked upon appeals and writs of error, it has power upon the analogy to Rule 29 to so adapt its orders as to secure to Respondent the fruit of the litigation in case petitioners shall ultimately fail in this Court.

ANSWERING BRIEF

CHAPTER I.

PRELIMINARY OBSERVATIONS.

An outline of the facts of these cases, the issues and points involved, and of the history and character of the mining claims involved, is contained in the "Statement of the Case," page 3 of our opening brief in the Court of Appeals, which we attach or file herewith as Exhibit A.

The rulings of the trial Court upon the element of adverse possession as an element in respondent's title, and upon which the Court of Appeals reversed the judgment below, are but a few of numerous errors committed at the trial and duly assigned, and any of which would have required reversal. But the Circuit Court of Appeals considering that a reversal was required by the trial Court's failure to instruct upon adverse possession, elected to regard a decision upon the other assignments as unnecessary, and reversed without discussing the remaining errors.

We will take up questions of adverse possession and mineral discoveries discussed by petitioners presently herein (pp. 29, 60-66, post), but pause to mention that the petitioners' case for review depends not alone upon a showing that there was error in the precise ruling or language in the opinion complained of, but they must show that there was no error in the record, duly assigned, which required a reversal independent of that upon which the reversal occurred. For even should we concede their contention upon one feature of the law, yet if the *judgment* complained of was right upon the whole record petitioners cannot complain. This upon the established principle that a complaining party is not injured by a correct judgment rested upon erroneous or insufficient grounds or reasoning.

"This Court feels itself sanctioned in referring the decision of the State Court in this case to the ground on which it ought to have been made instead of that on which it appears to have been made. The question before an Appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed."

McClung vs. Silliman, 6 Wheat. 598; 5 L. Ed. 340.

A complaining party must not only show error but show that the judgment is not justified by other parts of the record.

Penn. R. Co. vs. R. R. Co., 157 U. S. 225; 39 L. Ed. 682;
Bank vs. Willingham, 213 Fed. 219;
Evans vs. Glass Co. 83 Fed. 706;
4 Corpus Jur., page 663 and cases note 92.

"Assignments which are predicated upon the *opinion of the Court* or on reasons given by the Court for its ruling or decree, are not available."

Evans vs. Glass Co., 83 Fed. 706.

It is well settled that a record upon review is in the nature of a pleading, and it is upon the petitioner or complainant to affirmatively show error and injury not merely by the language of the Court in deciding against him, but that the judgment itself is wrong. The petitioners have not attempted to show that the judgment of the Circuit Court of Appeals is wrong upon the record, but they complain of certain parts of the language of that Court in deciding the case. For this reason their petition for the extraordinary remedy of the writ of certiorari ought to be denied.

We will set out a few of the many particulars in which the record necessitated a judgment of reversal of the trial court, and which would be equally or more decisive in effect upon petitioners, than that assigned for its reversal by the Court of Appeals.

CHAPTER II.

PETITIONERS HAD NO TITLE OR RIGHT OF ACTION TO SUSTAIN THEIR ADVERSE SUITS.

A question which lies at the threshold of this case and which is anterior to all questions of pleading and proofs, is that which relates to the petitioners' own asserted title to the alleged junior conflicting Guy Davis mining location in support of which this adverse suit was begun. All the evidence there is in the record on this subject is documentary evidence submitted by themselves at the trial. There cannot be any question of conflicting evidence therefore, or question of decided fact to embarrass this Court. These documents are tabulated with record page citations on page 51 of our brief Exhibit A herewith, and need not be repeated. Their legal effect is extended at length and from every angle on pages 52-97 of Exhibit A. The result is that the trial Court committed the following reversible errors:—

(a) *U. S. Revenue Stamps.* It admitted in evidenced deeds without revenue stamps attached or cancelled as required by the War Revenue Act of 1914, effective Dec. 1, 1914, contrary to the ruling of the Ninth Circuit Court of Appeals in Sackett vs. McCaffery, 131 Fed. 219. See brief Ex. A. pp. 53-56, 721-3. This error however would only require a reversal, and might be avoided on another trial.

(b) *Misjoinder.* Said evidence showed that only two or three of the petitioners (plaintiffs below) had any appearance of right or interest in the alleged Guy Davis mining claim, or were represented in any adverse in the U. S. Land Office, which is a condition precedent to any adverse suit under U. S. Rev. Stat. Secs. 2325-2326. One of them, Wm. Forman, was brought in by amendment or substitution at the opening of the trial, nearly a year after the adverses, and after the sixty days allowed by law for beginning suit had expired. Yet he had no deed conveying to him any interest in the claim, either from any adversing party or

at all, but only an attorney's contract of employment to render services in defending injunction suits to keep the jumpers off the ground, as compensation for which he was to receive 10 per cent of the net proceeds of all gold the jumpers might extract from the ground. See Exhibit A, page 51, item 8; effect discussed Ex. A., pp 53-58. At these references record pages are cited and we are saved needless reprinting. The brief is a hand-book of citations to the law and the facts.

In any event, and regardless of the prohibited use of deeds without revenue stamps, and the parties thereby let in, some of the petitioners had no title or standing as plaintiffs, and none of them had a joint right of action.

The result was misjoinder of plaintiffs barring a right of recovery by any, under the Federal practice (Exhibit A. pp. 58-63). Yet the Court gave judgment for all and denied a request for peremptory instruction to the jury. (Rec. p. 1208, p. 149 and brief Ex. A., p. 574, Sec. 674.)

Petitioners have urged that misjoinder must be raised by demurrer or plea in abatement. But the misjoinder was disclosed only by their own evidence, not by any evidence for respondent. Respondent might have to tender an issue by pleading to entitle him to present evidence thereon, but he is not precluded from objecting to the petitioners' evidence and recovery on the ground that their own evidence forbids such recovery.

(c) *Relocation—Estoppel.* But the evidence for petitioners presented a still more explicit bar to recovery by all or any of them. They introduced in evidence their location notice of the Guy Davis claim, which showed it was a "relocation" of the Salt Lake No. 3 (the claim of respondent) as abandoned ground, or for *"failure to comply with the law"*, (Record page 237; brief Ex. A., pp. 67-80). The effect of such relocation notice of record was an estoppel upon the plaintiffs to question or dispute the entire legal validity

of the Salt Lake No. 3 and to bar themselves from locating or attempting to locate or initiate a junior conflicting mining claim upon the same ground. By so attempting they became trespassers and none of the petitioners acquired any title, under the decisions of the U. S. Supreme Court, the Circuit Court of Appeals for the Ninth Circuit, and the Supreme Courts of all the mining states.

Belk vs. Meagher, 104 U. S. 279-89; 26 L. Ed. 735;
Zeres vs. Vanina, 150 Fed. 564; Id. 134 Fed. 610-14;
Patchen vs. Keeley, 19 Nev. 404; 14 Pac. 347;
Wills vs. Blain (N. M.) 20 Pac. 798;
Brown vs. Gurney, 201 U. S. 184; 50 L. Ed. 717;
Numerous citations pp. 69-80 of our brief Ex. A. herewith.

Under these uniform decisions construing the legal effect of similar recitals in location notices, especially under the decision of this Court, it was the duty of the trial Court to have given the peremptory instruction asked for requiring the jury to find a verdict for defendant. This was refused, exception taken, and error assigned as stated above (Record p. 149; discussed in brief Ex. A., page 547, Sec. 674 and pp. 69-80).

They say it was an amended notice. But it was amended from a lode claim, into an irrebuttable placer *relocation* notice, which prevents their being heard to assert that the Salt Lake No. 3 was invalid, or that their own junior conflicting claim was valid. They became thereby confessed trespassers. (Ex. A., pp. 82-94.)

(d) *Effect Of No Title or Right of Action.* Where a plaintiff has no title himself, and no right of action he has no standing in the suit, and no status to question the validity of the mining location of his adversary.

(See cases cited pp. 242-243 of our Brief, Exhibit A, herewith case No. 2952).

Not even where such a plaintiff has gotten far enough along at the trial to obtain a verdict of no prior mineral discovery in the mining claim of the defendant, does he acquire a status to be heard, and he cannot prevail.

Healey vs. Rupp, 86 Pac. 1015-1019. And see:
Lavagnino vs. Uhlig, 71 Pac. 1046-9;
Ferris vs. McNalley, 121 Pac. 889-893;
Lalande vs. McDonald, 13 Pac. 347; 80 Pac. 139;
74 Pac. 1061; 65 Pac. 633; 82 Pac. 538.

The trial Court therefore erred in not instructing, and in giving a judgment for the plaintiffs. The Circuit Court of Appeals should have reversed for this reason.

CHAPTER III.

THE COMPLAINT.

Their complaint did not state facts sufficient to constitute a cause of action, which we assigned as error in giving judgment for plaintiffs. And we objected to the admission of evidence thereunder, which was overruled and error assigned. (No. 1 on p. 708, brief Ex. A, with record citations).

The particulars of insufficiency with citations of cases are set out in brief Ex. A at pp. 204-221; 252-271 and need not be repeated.

The complaint itself is set out at pp. 248-252 of Ex. A. The Court will observe that if it undertakes to raise any issue at all, it is as to the priority of their own location in point of time to that of respondent. But that they never really intended to litigate that question is apparent from their whole case in chief, Record pp. 213-525; and abstract of evidence as to the time of their presence on the ground about 60 days in Oct. and Nov., 1913, Ex. A, pp. 315-7; testimony as to prior improved condition of ground by both parties Ex. A, pp. 283-287; undisputed testimony for respondent at pp.

161-182 of brief Ex. A. Also statement in their petition for certiorari page 1, giving relative dates of location.

In the face of these facts, it must be that if the cases cited at pp. 252-4 of Ex. A are ever applied, it should be applied to the facts at bar. For one miner or locator cannot by entering upon the possession of another and going through the performance of the ordinary acts of location acquire any rights to the ground. It is only upon the open unappropriated and unoccupied public lands of the United States that a man has the right to make a valid location, and if he does not allege that he made it there he does not allege a location at all. And if he would allege that he has made a valid location notwithstanding the prior location and possession of the ground, he must allege the facts constituting invalidity of the prior location. In general on this proposition see the following cases:

Lockhart vs. Farrell, 86 Pac. 1077; 210 U. S. 141-148; 52 L. Ed. 992;
Belk vs. Meagher, 104 U. S. 279;
Reavis vs. Fianza, 215 U. S. 16;
Ely Min. Co. vs. Clipper Min. Co., 194 U. S. 220-30;
Cases cited in brief Ex. A, pp. 220-1.

Certainly there is no ground of invalidity in fact alleged against the Salt Lake No. 3, Midas or Evening Star claims in their complaints, and their complaints were insufficient for any purposes of an attack on the validity of those locations, even were any ground of attack open to them and were they not barred therefrom by the form and recital of their location notice (p. 14, ante).

In Hammer vs. Garfield Min. Co., 6 Mont. 53; 8 Pac. 153, the Supreme Court of Montana ruled that a trial instruction was erroneous insofar as it stated that the original Garfield lode location was not questioned in the pleadings, but the instruction was correct

otherwise. But the U. S. Supreme Court held upon review that the instruction in question was correct on both grounds, not only as ruled by the Montana Supreme Court, but because the validity of the prior location was not sufficiently challenged by the answer. (130 U. S. 219; 9 Sup. Ct. 548; 32 L. Ed. 864).

See also Lockhart vs. Farrell, 210 U. S. 148, 28 Sup. Ct. 681, reversing a judgment of the Supreme Court of Utah, 86 Pac. 1077 and holding that the burden is upon a junior locator to allege and prove the ground of invalidity of the prior location relied upon, viz: that there was an existing prior location of the ground in effect and not abandoned at the time of the senior location, if he would invalidate the prior location upon that ground.

In Russell vs. Hoyt, 2 Pac. 95 it was held that proof of no prior mineral discovery as a ground of invalidity of a prior location was properly rejected, in the absence of any allegation of such ground in the pleading of the party offering the proof.

And see burden of allegation and proof generally upon junior locator attacking a senior, with citation of decided cases, in Exhibit A herewith, pages 205-207 et seq., and Willison vs. Ringwood, 190 Fed. 549 citing and relying upon Lockhart vs. Farrell, 210 U. S. 148. And burden of proof against junior, see pp. 352-362, brief Ex. A.

We also moved to strike out all their evidence offered to invalidate our lode claims on the thory of no prior discovery as immaterial, irrelevant, insufficient and inadmissible and because it did not follow or tend to prove any averment in their complaint (Record page 526; overruled record p. 533; error assigned No. 33 record p. 137).

Inasmuch therefore as the respondent's lode locations were admittedly prior to the attempted locations of the petitioners, and no ground of invalidity or noncompliance with law in their initiation was charged in the complaints, nor any forfeiture or abandonment, the

lode locations were conclusively valid and unimpeachable in these proceedings. For possession itself denotes title as we showed (brief Ex. A, pp. 196-6; 206-9; Campbell vs. Rankin, 99 U. S. 261; 25 L. Ed. 435; and one can no more impeach the title to a mining claim than he can any other property without something alleged against it.

Action at Law. Again the complaint is insufficient because, as the Circuit Court of Appeals held, this is an action at law and properly tried below as such. The first half of Judge Ross's opinion is devoted to reaching that conclusion. But the complaint states only a cause of action in equity, if any at all. For it alleges that the plaintiff's themselves are in possession of the ground and that the defendant made a wrongful adverse claim thereto by a survey and application for patent, and prayed a *decree* that plaintiffs themselves are the *owners and in possession.* There is no pretense of any averment of wrongful ouster, dispossession or withholding of the premises by respondent, as would be necessary to found an action at law. The complaint might have been sufficient in equity under such a statute as that cited in Robinson vs. Lange, 148 Fed. on page 804, or under ordinary equity procedure, but not at law. See cases cited in brief Ex. A, pp. 310-326; testimony cited Ex. A, pp. 313-317.

CHAPTER IV.

EVIDENCE.

GROUND NOT VACANT, UNOCCUPIED OR UNAPPROPRIATED.

Adverting again to the issues, the complaint alleged priority of location and possession by petitioners on the ground. Respondent denied and alleged his own prior location and possession, which petitioners denied in reply. (Record pp. 23-24; 30). But petitioners put in no evidence at all to sustain their complaints as we

showed in the preceding chapter hereof, but their own evidence contradicted their averment (pp. 16-17, ante). Ex. A, pp. 313-317. Respondent's testimony abstracted in Ex. A, pp. 161-183; 187-193; 283-286; 488-490. Their own testimony showed they were 16 years later than respondent, and on page 236 of Ex. A, the testimony of Healy, one of the petitioners, is abstracted and on page 288 of Ex. A, that of Van Orman, showing that they knew full well of respondent's prior possession and occupancy of the ground at the time they attempted to make their own locations. And if they had not so testified they would be held conclusively to know it, as this Court has held under similar facts (cases cited Ex. A, page 237).

Respondent's evidence above cited showed that he and his grantors had continuously held, occupied, worked and improved the Salt Lake No. 3, Midas and Evening Star, and all the other claims of the Copper Canyon group for many years prior to the coming of petitioners, which occurred in 1913, shortly after news of a rich placer strike made by respondent upon his own property by means of a shaft he had that summer driven to bedrock in the wash of the narrow canyon crossing the lode claims. Knowlege of this "strike" was the incentive which led petitioners and their privies to trespass on the ground, which they did at first by a shaft just outside our west side line, and from thence tunnelling under our ground. The first injunction suit followed. Whereupon the two petitioners who are attorneys came in and joined hands for 10 per cent of what gold they could get out of the ground, and under contract to defend the jumpers in the injunction suits then thickening. Their resources plus those of the jumpers devised the new conflicting locations as placer claims, which at once followed. And under pretense of locating and working these new locations, certain additional shafts were sunk on the ground itself, location notices recorded, and gold taken out until two new injunction suits were

supposed to have put an end to operations about two months later.

Prior to the attempted jumping, respondent and his grantors had been in possession by their agents and employees ever since the date of the lode locations in 1897 and 1907 respectively, with all annual labor required by law fully performed and unchallenged by petitioners. From two to twenty men and more had been kept constantly employed, as appeared by the payrolls offered (but rejected and error assigned), not all of this work being done on the lodes here in dispute, but on the group of which they formed a part. A stamp mill had been built on the ground, and extensive mining done on an adjoining claim of the group. While on the lodes in dispute sundry open cuts, shafts and a tunnel had been excavated, the emphasis of mining had been on the Washington claim, 600 feet away from the Salt Lake No. 3. Yet far more than sufficient had been done on the claims in dispute. The law does not require that active mining and shipmen of ore shall take place from every mining claim in a group, as a condition to the continued validity of each (Ex. A, p. 499 cases), nor will it apportion the benefits resulting from a common improvement (Id. p. 655.) But the owner may excavate ore from one mine, and from thence extend his operations to the adjoining claims of the group.

But as we said, the owners had always been represented on the ground by a watchman or two, residing in one of the houses on the ground of which there were a number, whose duty it was to keep up the boundary monuments, perform the annual labor, and take care of the surface improvements, tools, etc. And these were the exact conditions in 1913 when the petitioners and their privies undertook to enter and make their conflicting mining locations.

In what we have said, we do not overlook their testimony regarding lodes and veins, which is considered in Chapter 6, page 29, *infra*, notwithstanding

there was no issue as to mineralized conditions, discovery or other subject of invalidity.

Under the foregoing condition of the record, the question arose as to whether they could acquire any rights in the ground by entry and attempted performance of the acts of location, while the ground was in the actual possession of another. We contended that they could not, and for that reason the evidence did not warrant a judgment in favor of petitioners for possession, or quieting their pretended title or possession. We asked a jury instruction accordingly, but it was refused as stated, and we also challenged the verdict and judgment as being unsupported by the evidence and contrary to the law, and assigned error thereon (No. 42 on page 754, and p. 665 and No. 41, par. 8 on p. 749 of brief Ex. A). We also asked non-suit and for new trial on same grounds.

The citations to this proposition appear on pp. 290-309 of Ex. A. Therein the principle has been applied to almost every class of public land entry and mining location, and it is held that no matter whether the prior location is valid or invalid as against the government, the owner or occupant cannot be forcibly, surreptitiously, clandestinely or fraudulently intruded upon or ousted while he is asleep in his cabin or temporarily absent from the claim. See cases p. 293 of Ex. A, among others grouped at pp. 290-309.

We would not be understood to contend, however, that where a prior attempting locator has failed to make a mineral discovery, or otherwise failed to initiate a valid mining location, and is not in *actual possession* of his claim, either in person of by an agent, employee, custodian or perceptible improvements, that another prospector may not in good faith enter upon the ground during the absence and mere claim of the prior party, and prospect for and discover mineral and make a valid location which the law will protect against the previous ostensible locator. For in such case no breaches of the peace are probable, and there is no actual trespass

involved, because no actual possession to be invaded. But where there is actual possession and presence in person or by employee, agent or custodian the law is otherwise. And the law has been so declared in favor of a prior good faith occupant under claim and color of title (as here) by the U. S. Supreme Court so recently as 1918 and 1913, in

Dennee vs. Ridpath, 38 Sup. Ct. Rep. 826 (1918);
Lyle vs. Patterson, 33 Sup. Ct. Rep. 480; 228 U. S. 211.

We do not know whether there is to be implied any dissent from this proposition in that paragraph of the opinion of his Honor Judge Ross in this case, on page 92 of 249 Fed, Rep., where he says that;

> "The record shows without dispute that the sole basis of such intrusion upon the actual possession of plaintiff in error was and is the contention that no discovery of a lode or vein was ever made within the boundaries of the Salt Lake No. 3, Midas and Evening Star lode claims. That discovery of a vein or lode within its boundaries is essential to the validity of any lode claim is beyond question and the law is well settled that at any time previous to such discovery ground within the boundaries of such a claim, although within the actual possession of the claimant, is open to the entry of others *by any legal means* for the purpose of locating it under the mining laws. See the numerous cases cited in the recent case of Consol. Oil Co. vs. U. S., 245 Fed. 521."

But the opinion and cases cited in the Oil Co. case shows it is not in point on the facts here, because that was a case where prior to any discovery of mineral the United States itself as paramount owner intervened and withdrew the land from entry or location, and thereby revoked the offer it had made of the ground as a mining claim under U. S. Rev. St. Sec. 2320. The loca-

tor had not completed his location, and so no rights had attached *as against the United States.* No question between private citizens was involved, and no breach of the peace or conflict between individuals was possible or probable. This is the consideration which rules the line of cases we have cited. And the United States as owner had the same right that any land owner has to withdraw an offer of sale before acceptance or compliance with the terms of the offer.

The opinion in the Oil Co. case (by Judge Ross himself) clearly distinguishes however between the rights of a second or junior attempting locator to enter or trespass on the actual possession of another, and the rights of the Government to interfere and withdraw the land from entry, by saying (on page 524 bottom);

> "It is entirely true that until discovery the locator can acquire no right *as against the Government;* but it is well settled that while in the bona fide effort to make such discovery, the ground that he has marked in accordance with the statute, and of which he is in *actual possession,* will be protected by the Courts against any forcible, fraudulent, surreptitious or clandestine entry of others by any third party, although it is open to entry by others *by any legal means* for the purpose of locating it under the mining laws."
>
> Citing Sparks vs. Pierce, 115 U. S. 408, 413; 6 Sup. Ct. 102 and other cases.

And on page 525 of the Oil Co. case (245 Fed.) his Honor further proceeds to show that this possession and right of possession prior to discovery is a right protected by law, and is the subject of sale and conveyance. All of which is opposed to the theory that a stranger may enter without leave, take away that possession, and acquire it himself without the consent of the possessor. The expression *"by any legal means"* supra must therefore mean "peaceably or with the consent of the owner or occupant" for any other entry would not be legal means at all as we have seen. But if the ad-

verse entry were done with the consent or acquiescence of the owner or possessor, and a discovery and location followed, the prior owner and occupant would be estopped to complain as has been held.

Ely Min. Co. vs. Clipper Min. Co., 194 U. S. 220-30.

We are not to be understood as consenting to the theory of no prior discovery by respondent but demurring thereto. And in view of what followed the excerpt quoted in Judge Ross's opinion in the case at bar (p. 23, ante), it is probable that His Honor intended more to demur thereto as applied to the facts of this record. For to hold that petitioners might invade the prior actual possession of respondent under the facts at bar would be at variance not only with the Oil Co. case, 245 Fed. 524-5, and numerous cases there cited, to which he referred in corroboration of his opinion, but also to the settled rule in the U. S. Supreme Court and other cases we have cited.

To illustrate this, let us refer to the "numerous decisions" referred to by His Honor as "being cited in Oil Co. case supra. The first is the case of Sparks vs. Pierce, 115 U. S. 408, cited at bottom of page 524 of 245 Fed. That case holds that a possessor and occupant without a valid location cannot contend against a patentee of the United States any more than he can against the U. S. itself. Which is the same as saying that a mining locator with ever so good a title will lose it if he fails to adverse and bring a suit in support against a patent application under U. S. Rev. St., Secs. 2325-2326. But that is a distinctly different question.

Belk vs. Meagher, 104 U. S. 279, 287, is further cited among the numerous decisions in Oil Co. vs. U. S. But in that case this Court carefully pointed out that Belk's possession was not actual but constructive and casual only, and he had only spent a day or two on the ground as any prospector might; he had no improvements or other possession, and the subsequent locator entered during his absence, which was most all the time.

Had his possession been actual the case would have been otherwise.

In Dev. Co. vs. Olmstead, 103 Fed. 573 (top) it is said:

> "It is not pretended that the defendants or their predecessors remained in the *actual possession* of any part of the premises. And if they had the law is well settled that mere occupancy of public lands and improvements thereon give no vested right therein as against the United States and consequently not against any purchaser," Citing Sparks vs. Pierce and Belk vs. Meagher, supra and other cases.

That is true; if there is no actual possession, or if the U. S. or its grantees or patentees are not in the way, as they are not in the cases at bar. But the possession must be acquired by *"legal means"* as the Court goes on to say.

In Cosmos vs. Oil Co. 112 Fed. on p. 14 the Ninth Circuit again held:

> "The discovery of mineral was essential, but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it cannot in our opinion be said to be vacant land at the time of appellants selection thereof under the act of 1897."

And Rooney vs. Barnette, 200 Fed. 700-1:

> Location before discovery gives the valuable right of possession against all intruders, and this right can be conveyed to another.

And so on down the list of the numerous decisions referred to by His Honor Judge Ross in Oil Co. vs. U. S. 245 Fed. 524-5, they are all one way and against the right to trespass on the actual possession of another, without his consent, in order to initiate a mining location or other entry.

We need not further digress. If petitioners desired to allege a valid mining location within any exception to the general rule against invading the actual possession of another, they should have alleged the facts constituting such exception. That is, they should have given color by alleging our prior lode location, and that their own entry was made peaceably and with our consent or acquiescence, and was therefore by "legal means." On the contrary, they alleged their own priority of location and possession.

The result is that petitioners had neither title nor right of possession to support the action, and no actual possession to support the averment of possession in their complaint. The jury should have been peremptorily instructed to find against them in favor of Respondent. Their verdict is against the evidence and contrary to the law. Exceptions were duly taken in both particulars, and the action of the trial court assigned as error. The Circuit Court of Appeals should have reversed for this reason, and the judgment rendered by the Court of Appeals is justified by the condition of the record.

CHAPTER V.

THE EVIDENCE.

(a) *Ouster and Detention.* Not only was there no allegation in the complaint that this respondent had ousted them from the mining ground in question, or was wrongfully detaining the same from the plaintiffs at the time this action was begun, as is necessary in an action at law to recover such possession, but they alleged the exact contrary of this, and alleged that they themselves were in possession, with defendant making a wrongful adverse claim thereto in the U. S. Land Office (see page 16, ante), and they asked *a decree* in effect quieting their title, and adjudging them to be the owners.

But, as usual, their proofs bore little relation to their allegations and they themselves testified to the contrary, and that their own presence on the ground was limited to a time within sixty days altogether, in between injunctions. (Ex. A, pp. 316-7; defendant's possession, Ex. A., pp. 313-315; 161-182; 187-193; 283-286; 488-490). Under these conditions they could not succeed in an action at law to recover possession. (See cases cited in Exhibit A, pages 312-326).

(b) *Vacancy, Unoccupancy, Etc.* They neither alleged nor proved this, at the time of their attempted locations, but the proofs showed the contrary. The same record citations apply as in the preceding paragraph. They could not therefore validly initiate a mining location, or any rights to the ground, but were trespassers simply. See citations and references on pages 22-23, ante. Chap. VIII and pp. 282-309 of brief Ex. A).

CHAPTER VI.

PETITIONERS' CASE AS TO LODES AND VEINS.

Our objections in the Circuit Court of Appeals to the trial Court judgments, so far as they related to this subject independently of the defense of adverse possion, were briefly as follows:

Respondent and his grantors having been in *actual possession* of the ground for a great many years prior to the coming of petitioners, as purchasers on the record; with many thousands of dollars worth of valuable improvements, buildings, roadway, tunnel, shafts and cuts on the ground itself; with very much more still on the adjoining claims of the same group; boundary monuments up and in place; all annual labor kept up and performed; recorded location papers; and a watchman and caretaker constantly present and residing on the ground in charge of the ground, improvements, tools, etc., for the owner; these amounted to prima facie proof of title and a valid location, which includes the presumption of every element necessary to constitute title and valid location. This when reinforced by affirmative evidence of the exposure within the tunnel, shafts and cuts, roadway and mill foundations of various fissures in place, varying from a few inches to 4 or 5 feet in width, and having a strike or direction, and a dip or depth into the solid rock which forms the mass of the mountain; and with included matter of different character from the country rock, and a mineralization in the precious metals of gold, silver and copper extending to as high as $11 and $12 a ton as disclosed by assays of samples taken at and very near the surface of the ground; with a tendency to increased values as depth is attained—these made a very strong prima facie case of mineral discovery, validity and due location of the lode claims at the dates thereof in February, 1897, and March, 1907, respectively. That this showing, which was undisputed in every fact and detail by any contrary

evidence, could only be overcome by a distinct averment in their complaints charging invalidity or non-compliance with law in some one or more distinct particulars, so that respondent might come prepared to meet the same. Also by proof at the trial to correspond with the issue. See cases and references in Chap. III., pp. 17-18 hereof. In their petition and brief they say they assumed this burden and discharged it, but as they have not always abided thereby, we reiterate the rule.

Our objections therefore in the trial Court and Court of Appeals was that no testimony was competent and admissible in chief to question the sufficiency and due initiation of respondent's lode claims, but only as to relative priority in date between petitioners' and respondent's lode claims. And that under the second defense of our answer it was only necessary for respondent to make a prima facie case of due location, which as we said was done by undisputed testimony.

But as petitioners were permitted, nevertheless, yet their testimony does not meet the requirements of the rules of law and evidence by which to disprove prior mineral discovery in any particular, and the verdicts and judgments are therefore unsupported by evidence and contrary to the law and the evidence. All their testimony intended as such disproof is grouped and cited to the record on pages 511-539 of our brief, Exhibit A, herewith. It is analyzed and compared with the mining decisions of the U. S. Supreme Court and the other Federal and State Courts, and with the contentions of petitioners, throughout pages 328-510 of said brief, Exhibit A. But its substance may be stated briefly under two or three heads:

1. They testified that they had "been over the ground" and did not see any lodes or veins, or what they in their judgment and experience would consider to be such, or within their definition of the term. But on cross-examination they testified that they did in fact see the different veins or fissures to which respondent's

witnesses later testified in defense, albeit they called them by different names. Also that they contained included material of different character from the surrounding country rock on each side, with upper and lower walls. But that they would not consider any such fissure material to be a locatable lode or vein without it contained pay ore or commercial ore at the surface. That they would not consider such a fissure to be a true vein even though the samples therefrom showed assay values at the surface as high as $11 or $12 a ton in the precious metals, and even though very much valuable ore, thousands or tens of thousands of dollars worth, had been shipped from a claim adjoining the Salt Lake No. 3 and about 600 feet away. They must still have commercial ore at the surface of these three lode claims that could be shipped at a profit.

2. They further testified that to determine if there was such they took certain rock samples from the surface of each of the Salt Lake No. 3, Midas and Evening Star lode mining claims, at points "at," "in" or about the different openings and tunnel thereon, but not affirmatively from within the walls of the fissure veins, nor within the boundaries of presumptive enrichment. That these rock samples so selected by themselves were thereafter assayed, and the assay returns from some but not from all of these samples were placed in evidence, showing by the assayer's certificate that such samples had only assayed "trace" or "O," except in some instances where their own assays showed mineralization to the amount of $0.97, $1.23 and $1.46 a ton (Exhibit No. 1, page 392), and $0.63 and $1.34 a ton (Ex. A, page 450).

This in itself is sufficient to establish locatable veins within the decisions cited in our briefs. And the fact that they also secured some rock samples which yielded only "trace" or "O" in assaying is nothing in the scale of evidence. Because unmineralized rock samples are easily secured upon every mining claim. The veins them-

selves even contain inclusions of country rock that is unmineralized like that outside the walls of the veins, and even the gangue or confessed vein material is often or most usually poor and barren at some points and highly mineralized at other points in its strike and dip. All of which has been so often judicially noticed as to be a commonplace in mining law. Where the walls of the fissure appears, very slight evidence of values will suffice to prove a locatable vein or lode.

> Min. Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712-14.

But a number of their samples and assays were withheld from the evidence by themselves, and they refused to put those samples and assays in evidence when requested by respondent. The Court sustained their objections to being obliged to do so on the ground that they had said nothing about those assays in chief, simply that they did take them, and that it would not be proper cross-examination to go into that. Notwithstanding that, their witnesses were being put on the stand for the purported purpose of disproving lodes and veins by means of disproof of values alone, for which purpose they say in their petition for certiorari (p. 6) that they assumed the burden of proof on this subject.

But in making the objections to their own witnesses telling all they knew and the full truth in relation to the matters about which they were put on the stand and sworn to testify, *i. e.*, on the subject of disproof of veins by means of disproof of values in certain samples taken by themselves, petitioners secured a further ruling by the trial Court that it was immaterial how large and how valuable the veins now exposed in the various cuts, openings and tunnel are, no witness could be questioned in regard thereto unless the respondent could show at the same time that such vein or lode and the particular surface exposure thereof had been known to respondent prior to the coming of petitioners in Sep-

tember, 1913. And this notwithstanding that petitioners now say on page 28 of their brief for certiorari that

> "It will be appreciated that so long as the existence of a vein or lode is established the Federal statute is satisfied."
>
> And that:
>
> "proof of the existence of a lode or vein, mine or deposit, may be of such a character as in itself to sufficiently establish the fact of discovery thereof by the original locator."

Yet at the trial they constantly secured the exclusion of testimony and proof "of the existence of the lodes, veins and deposits" upon the ground that it was immaterial how large and valuable such lodes, veins and deposits were or could be now proved to be, without we could do that which petitioners themselves were unable or unwilling to do, viz: go back and identify the conditions with those upon which the locators had based their locations. But they now insist, on page 28 of their brief in this Court, that such proof might have been of such character as to have established the fact of discovery thereof by the locators.

The very evidence of which they speak in vindication of the decision in Vogel vs. Warsing, on page 28 of their brief, and in attempted distinction thereof from the facts at bar, is shown by the opinion in that case to have been identical with that rejected at the trial of this case, viz: evidence of present existence of values, as distinct from the values and appearances on which the mining claim was located.

Yet respondent had to forfeit the protection of a considerable amount of testimony as to present existence of large and valuable veins because he could not do that which petitioners now insist that he had no need to do. This was the more harmful because respondent was himself but a new-comer in September, 1913, and was not himself sufficiently acquainted with the precise extent of

the workings and surface exposures in September, 1913, nor with what was known to his grantors in that respect in many instances. Not knowing that such a line would be drawn at the trial in 1915, he had had no occasion to investigate and detemine the extent of the various workings and exposures on the ground prior to September, 1913. He had himself had said openings enlarged, deepened and extended since September, 1913, by workmen employed for the purpose, and he could not tell where the prior exposures ended and the new surfaces began, in many instances. By such rulings respondent was much hampered and prevented when his defense came, because he could not in many instances show the extent of the exposures and mineralized veins and the extent of his grantors' knowledge thereof before September, 1913. And because the Court ruled that it did not make any difference how large and valuable the veins actually are, without we could do what it was the business of petitioners to do—go into the question of prior knowledge.

Yet petitioners were allowed to go to the jury on the question of prior mineral discovery, based wholly upon samples recently taken and selected by themselves since their own coming in September, 1913, and without any showing or connection with the physical conditions, exposures and disclosures of mineralized veins by the original locators, or by their grantees in possession prior to September, 1913. And the Court refused to strike out all such testimony for petitioners when often moved and requested so to do.

But we still challenge the sufficiency of their testimony on this subject, and insist that it does not support the verdict and judgment, but the latter are against the law and the evidence, and have duly assigned the same as error by several of our assignments.

Going back, however, to their testimony that nothing they saw amounted to a lode or vein in their opinions or experience, this is qualified by their further assertions that they would not consider anything to be a vein,

without it contained commercial ore at the surface. Which is a mere conclusion condemned by the U. S. Supreme Court and other courts in Mining Co. vs. Cheeseman, 116 U. S. 529, 29 L. Ed. 712-4; Book vs. Justice Min. Co., 58 Fed. 106, 121-128, and countless other decisions cited on pp. 197-203, 393-414 of our brief, Exhibit A, herewith.

But insufficient and immaterial as such testimony was, so far as the question of values is concerned, all of petitioners' testimony was further incompetent and inadmissible because it related merely to the conclusions which the witnesses drew from what they themselves saw or chose to see in the way of lodes and veins in September, 1913, not to any question of what the locators saw, observed or discovered within the sixty odd acres constituting these three claims when the same were located in Feb., 1897 and March, 1907, respectively. That was a long time ago and many changes had occurred. The shallow surface cut which originally exposed the vein on the Salt Lake No. 3 had become obliterated entirely and other open cuts and vein exposures had been made thereon. While on the Midas and the Evening Star additional work had been done, and the petitioners did not attempt to identify the precise locality or mineral exposures observed by the locators.

On the question of what constitutes a mineral discovery that will sustain or not a mining location the law is that the evidence must relate to the conditions and indications which were within the observation of the discoverer and which induced him to locate the ground with a view of further prospecting and developing it. By these only is the prudence of the locator in locating the ground to be measured, not by any *ex post facto* proceedings of strangers and persons hostile to his title, seeking to overthrow it. See cases cited in Exhibit A, page 338, including case of Chrisman vs. Miller, 197 U. S. 313-332. And this on the plain principle that there is no sequence between what one man

will see, observe and weigh on a visit to a piece of ground at one time, and those that another man will observe and the conclusions he will draw upon a visit at another time, or even at the same time. Petitioners testified to this fact (Ex. A, pp. 380-1).

The considerations that go into the determination of what is good mining ground are often too intricate and baffling, depending upon the knowledge and experience of a prospector or locator, and the conclusions he may draw, not only from surface indications on the ground, but from surrounding claims and the mineral character of the district. Mere "stringers" or seams at the surface, may lead to large ore bodies underneath, and the locator's knowledge and experience may lead him to firmly believe that they will. All these things are entitled to be weighed, and enter into a miner's conclusions and prudence exercised when he decides to locate and spend his further time and money in developing. Having located, it is unheard of that another may come on the ground and invalidate his location by giving a contrary opinion, especially when the latter desires to use the ground himself for mining.

Persons going upon the same ground at different times may not even see the same physical occurrences or phenomena, or not follow them up to the same extent, or may draw diverging conclusions therefrom. The influence of general mineralized conditions in the district obtains weight even in the conclusions of the Courts on this subject (Cases Ex. A, p. 342), and petitioners themselves say that diverging conclusions are legitimate and common where different men at different times undertake to pass on a piece of ground (Ex. A, pp. 380-1). Lodes and veins are seldom indeed continuous on the surface, and require much labor and digging to open up and get even a passing knowledge of the values and possibilities. They have no uniformity in width, direction, or strike and dip into the earth, and still less of uniformity in mineral content. They may be very rich or passably so at one point, and at others very poor. While at

some points it may almost "pinch out" and at others widen into extensive ore bodies, either in its strike or dip. They may manifest at the surface only in narrow seams or "stringers," but which the experienced miner may believe from his knowledge of similar occurrences in that or other neighborhoods, will lead to valuable bodies of ore a little lower down or further on. Every word of this has been observed, decided and judicially noticed not only by the U. S. Supreme Court as we shall see, but by all other Courts of the mining states, (cases cited brief Ex. A, pp. 342, 372-3, 396-414). It cannot follow therefore either as a matter of fact or law, that what these petitioners saw or the conclusions they drew as to lodes in 1913, were the same as what the locators saw or observed when they located the ground in February, 1897 or March, 1907. And this reasoning is not vitiated by the fact of petitioners coming on the heels of a rich placer discovery by respondent in the wash of the Canyon in the summer of 1913, where petitioners also at once riveted their attention and efforts. But not one particle of the testimony for petitioners was devoted to the question of what the original locators of the Salt Lake No. 3, Midas and Evening Star claims saw or observed in the way of lodes and veins when they located these claims in February, 1897 and March, 1907, nor in any of the subsequent workings before September, 1913.

Yet that petitioners well understood the rule of law on this subject is shown by the fact that when respondent's case was reached in the trial, they constantly objected on that specific ground to all testimony as to the present existence and disclosure of lodes and veins on the ground, unless respondent were able to go back and connect up by showing that the precise lodes and veins and exposed surfaces now disclosed were the identical surfaces and mineral indications observed by the locators and their grantees prior to the time of petitioners coming. And they secured rulings from the trial Court by which a considerable amount of tes-

timony was excluded on behalf of respondent, on the ground as urged to and stated by the Court, that it was immaterial how large and how valuable the veins on the ground actually are, unless respondent could show that they were seen and observed by the former owners prior to the coming of petitioners. So that one rule of law or evidence was applied to petitioners and another and different rule applied against respondent. Respondent, in his defense, was held strictly to the ruling just referred to, while the petitioners in making their case in chief, and as matter of invalidity of the prior lode claims, were permitted to testify not what the locators or their grantees had seen or observed years before, when locating or developing the claims, but what the petitioners themselves saw and the deductions they drew many years later. Yet these observations and deductions, made in 1913 in the manner and to the extent testified by petitioners, were never the same as those which the law requires as a test of original validity of the lode claims. (Cases cited pp. 338-9 Ex. A).

As a matter of fact, the law is just the other way. Petitioners in their case in chief (given a proper issue in the pleadings), could only disprove original discovery by evidence connecting up with the conditions and mineral exposures and general mineralized character of the neighborhood, as these were observed by the original locators at the time the locations were made. Or in default of these, then such as appeared to the locators or owners in any subsequent exposures of lodes or veins, or what was claimed to be such.

Had petitioners given any such testimony connecting up, as just stated, the respondent would have the right in response to establish the contrary by means of proof that valuable lodes and veins do now in fact exist at and near the surface of the ground, where they could have been and probably were seen and discovered by the locators when the locations were made,

and with little or no excavations required of surface material. And respondent had the right to make the same class of proof in support of his own second defense alleging title by regular mining locations. This, with the recorded location notice, amounts to proof of original mineral doscovery, as held by the Supreme Court of Nevada in Southern Cross Min. Co. vs. Europa Min. Co., 13 Nev. 383.

Petitioners might then have been permitted in reply to introduce evidence tending to show that respondent's proofs were untrue, and no such fissures existed. But they did not do this. On the contrary, after having themselves put in prohibited testimony (because not directed to what the locators saw and observed), they secured the exclusion entirely of testimony by respondent which they should have received and disproved, if they could.

The class of evidence on which petitioners rest their case, of persons sent to ransack the premises many years after a mining location for the purpose of equipping them to testify as witnesses against its validity, has been held to be incompetent, mischievous, and as tending to deceive, to injustice, in trials before a jury.

> Cheeseman vs. Hart, 42 Fed. 98;
> Clark Montana Realty Co. vs. Ferguson, 218 Fed., 959, 964.

See Ex. A, page 503.

Opposing counsel have not attempted to cite but one decided case in justification of this class of testimony, on which the verdict rests. And the fact that that was a trial before the Court in a condemnation suit where the issues were different makes it inapplicable (see Ex. A, Sec. 490, pp. 504-6). In mining adverse suits tried before a jury the courts condemn such testimony as mischievous and tending to deceive and to injustice.

This is very material and vital in determining whether there is evidence to support the verdict and

judgment, and whether the latter is against the law. For the U. S. Supreme Court has ruled that:

"It has long been the doctrine of this Court that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any evidence upon which the jury can properly conclude to find a verdict for the party producing it, upon whom the onus of proof is imposed. And that if the proof be not sufficient to warrant a recovery it is the duty of the Court to instruct the jury accordingly and if the jury disregard such instruction to set aside the verdict."

Coughran vs. Bigelow, 164 U. S. 308; 41 L. Ed. 446.

We asked such an instruction of the trial Court in this case, and the question is directly presented whether the Court erred in refusing it, and hence whether there is any evidence on which the jury could lawfully find against respondent on the theory of no former mineral discovery. Assignment No. 42, Ex. A, p. 754.

Also at the close of plaintiffs' testimony in chief, respondent moved the Court for an order striking out all the testimony for plaintiffs going to the question of lodes and veins for the reasons stated (Rec. p. 526), which was refused (Rec. p. 533) and assigned as error (Rec. p. 130 in No. 2952, and 137 in No. 2953. See Ex. A, p. 728.

We also excepted specifically to the instructions of the Court on the question of prior mineral discovery, because the evidence was not directed to the time, place or mineral conditions which the locators saw, and which influenced them to make the locations (Rec. pp. 1237-1240). And assigned the giving thereof as error *inter alia*, by assignments shown on pp. 159-166 of Rec. No. 2952. (Rec. 2953, pp. 163-169).

And we excepted to the verdicts and judgments for the same reasons. (No. 35 on Rec. No. 2952, pp. 139 and 147, par. 19 and 20). (Record No. 2953, p. 144, 151, pars. 20 and 21).

The legal effect of testimony as evidence, proof or disproof, is not increased or affected by its improper admission, but the verdict and judgment are still unsupported and against the law.

The Circuit Court of Appeals should have reversed for this reason.

Having been allowed to proceed on this theory, it was to be expected they would be at least reasonably thorough in inspecting the ground and perhaps do a little pick work. But their testimony was that they had "been over" or "walked over" the ground and made certain observations, (brief Ex. A, pp. 332-336), and looked in the shafts and open cuts. They testified also to having taken certain samples of rock and had them assayed, with no appreciable mineral results. But when it came to locating the points at which they had taken these samples, the nearest they would come to it was to say that the samples had been taken "at" or "in" a certain open cut or shaft, without identifying the same with reference to the walls of any fissure or vein exposed therein. See their testimony cited chiefly on pp. 434-439, brief Ex. A.

When cross-examined they admitted observing in the shafts, open cuts, etc. on these claims all the characteristics that go to make up veins and lodes within the definitions given by the Courts, including fissures or seams, breaks, fractures, etc., within the general mass of country rock, having walls and included material of different character, width, strike, dip, etc., but they were unwilling to use the words *veins and lodes* in designating them. Opposite pages 570 and 582 of brief Ex. A, are photographs reproduced from the record exhibits, which will inform the Court what the witnesses saw in two instances and yet they saw only "fault

planes", "fractures", "breaks", etc., etc. One of these (opp. page 528) as the Court will observe, extends right up into the grass roots near the surface. See our discussion and record citations at pp. 456-8, and 415-426.

This Court will observe we are discussing their testimony exactly as they gave it and as they limited and restricted it, not from the standpoint of arguing their credibility. If there are gaps and omissions it is their own, not the writer's.

Samples. Going further in their efforts to disprove lodes and veins they gave in what was claimed to be the assay values as denoted by the assay certificates of the rock samples they took from "at" or "in" each open cut or shaft, or tunnel where they sampled. Some of these showed actual values in gold, silver and copper sufficient at two points to sustain the locations as lode claims. This testimony is cited to the record in parallel columns with our witnesses on page 450, 534-539 of brief Ex. A.

It does not conflict or differ with that of respondent's witnesses at any point. They simply took a sample at different points on the ground or in the openings, and by luck or by care one witness would get more valuable assays than another. Even their own witness Phillips would get better assays from one sample taken by himself from one opening than from another taken by himself at the same point. And this is waiving the question whether he tried to get in on the mineralized vein or not with his samples, to which he does not directly testify.

That we may not be in the dark as to what is required to constitute a locatable vein or lode within U. S. Rev. St., Sec. 2320, so far as values are concerned, we refer the Court here to the mining decisions including those of the U. S. Supreme Court, see citations in brief Ex. A, pp. 197-203; 370-375, 393-414. If the boundaries are there and some values, it is sufficient, and the law does not require commercial ore at the surface or any other particular point on the vein,

either at the apex or in the depth, not to speak of the country rock outside the vein. Gold is where you find it, and if you have found the vein you can lawfully locate it no matter how poor the values at the surface.

Cross-examined why they would not call these veins or fractures, they spoke of, locatable veins, they answered as on pages 385-392 of brief, Ex. A, where the record pages are cited. They must have commercial ore, pay ore, at the surface where they took samples, or they were no true veins. This conclusion is incorrect both in mining and in point of law and the decisions. It is inconsistent with the decision of this Court in Min. Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712-14 et al, on page 200 of brief, Ex. A, herewith; with Judge Hawley's decision in Book vs. Justice, cited on pp. 393-401, and all the other decisions on pp. 401-414 of brief, Ex. A.

Yet because the witness demanded pay ore at the surface, and at the particular point on the surface where they chose to take their samples (vein or no vein at that point), a verdict of the jury was allowed to go against us and to remain as basis for a judgment. That judgment took away from respondent mining ground on which has been expended many thousands of dollars in improvements and in openings and excavations, and gave it to parties who had never expended a cent upon it, and whose only impulse was to acquire without consideration to the owner the valuable placer deposits which they knew respondent had already discovered and uncovered by an open shaft to bed rock in the channel of the canyon.

There is no question of weighing the evidence, nor a jury verdict to foreclose the matter here. The evidence as given by and on behalf of respondents themselves does not, nor does all or any of the evidence, justify the verdict, and the latter cannot stand. Weighed in the scales of law there is no evidence to support the verdict, but the whole evidence does affirmatively re-

quire a different verdict. See generally their testimony, analysis and comparisons thereof with the law's requirements and with the testimony of respondent's witnesses, and record citations, Exhibit A, pp. 363-455.

PETITIONERS' CASE AS TO LODES AND VEINS—Continued.

Error in Forbidding Cross-Examination.

As a part of petitioners' effort to disprove *present existence* of lodes and veins, they had their witness Phillips take 12 rock samples for assay. These samples, so far as their evidential value, were subject to all the infirmities before mentioned; *i. e.*, not testified to have been taken from within the fissures where mineral values might rightfully be expected, nor from any point observed by the locator of the Salt Lake No. 3 in February, 1897, and upon which he exercised his judgment and based his prudence in locating the ground. But Phillips testified he had his rock samples assayed, and the assay results from seven only out of the twelve were put in evidence. What his reasons were for keeping back five of them, and whether he had really gotten in on the veins with those five, he did not state. So upon cross-examination he was asked what became of the assays from the five omitted samples, but he was not allowed to answer. Objection was made by petitioners and sustained by the Court on the ground that petitioners had not asked the witness anything about those samples except that he had taken them, and that it was not proper cross-examination. Also that respondent to so cross-examine must show that the omitted samples were from surfaces exposed before the junior locations. This notwithstanding that petitioners were still on their case in chief, and ostensibly engaged in attempting to discharge the burden that was on them to show no lodes and veins, NOW, as a basis for an in-

ference that none had been formerly discovered. But the Court ruled in sustaining the objection that it was unimportant how large or valuable a vein there is in the ground, unless respondent himself could show that it was formerly known and discovered, a point to which none of the petitioners' proofs had been or was then being directed. The Court's ruling was therefore doubly erroneous, (a) in depriving respondent of his right to legitimate cross-examination, and (b) in depriving him of the legal presumptions of validity (*infra.* p. 17-18) and transferring to his shoulders the burden of proof which belonged to petitioners if they would invalidate or disprove a prior presumptively valid location.

This whole subject is treated at length with the authorities in chapter XIII. of our brief, Exhibit A, pp. 607-650, and need not be repeated. For these errors the Court of Appeals should have reversed the judgments of the trial Court.

CHAPTER VII.

RESPONDENT'S CASE AS TO LODES AND VEINS.

(a) *The Issues.* As we have seen, the complaint raised no issue as to lodes and veins in the ground, nor as to lack of prior discovery thereof by respondent's grantors, but only tendered the issue of priority of their own location. Their testimony could not enlarge the structure of the case as made by the complaint, even if otherwise sufficient and free from the defects, infirmities and admissions against interest we have noted.

By the second (first affirmative) defense respondent alleged his own prior location and possession in compliance with the mining laws (Rec., pp. 23-24). Under this defense only could discovery be an element in the case, and it was only necessary for respondent to make out a prima facie case of prior location and discovery, to succeed on this issue.

(b) *The Evidence and Presumptions.* In support of such priority of location by respondent there is the following proofs and presumptions:

1. The *recorded location notice* (Record, p. 570) and the recorded deeds in respondent's chain of title. (See list and record page citations in brief, Ex. A, pp. 105-105). Many decisions hold that recorded location papers with staking and marking on the ground and some development work are presumptive evidence of a valid mining location, especially in the hands of a good faith purchaser on the record.

Vogel vs. Warsing, 146 Fed. 950;
Jantzen vs. Copper Co., 20 Pac. 93;
Cheeseman vs. Shreeve, 40 Fed. 791;
Cheeseman vs. Hart, 42 Fed. 98;
Harris vs. Min. Co., 8 Fed. 863;
Lindley on Mines, Sec. 892 (3d Ed.);
Buffalo, Etc., vs. Crump, 69 S. W. 572-6;
Bevis vs. Markland, 130 Fed. 226;
Southern Cross Min. Co. vs. Min. Co., 15 Nev. 383.

And when reinforced by "some evidence" of the present existence of lodes and veins in the ground, amounts to evidence of prior mineral discovery.

Southern Cross Min. Co. vs. Min. Co., 15 Nev. 383;
Bevis vs. Marland, 130 Fed. 226;
Cheeseman vs. Shreeve, supra;
Cheeseman vs. Hart, supra;
And cases Ex. A, pp. 202-203.

In Jantzen vs. Copper Co. and Buffalo, Etc., vs. Crump, supra, the recorded location paper was a notice as at bar. Notice held prima facie evidence of *due location* and title in Ware vs. White, 108 S. W. 831-4.

Location certificates and notices are evidence of all the statute requires it to contain which is therein sufficiently set forth.

Bismark Min. Co. vs. Min. Co., 95 Pac. 14-18.
Strepy vs. Clark, 7 Colo. 614;
Hammer vs. Min. Co., 8 Pac. (Mont.) 153.

The Nevada statute as to notices are in two sections. Sec. 2422 provides that:

> "Any person * * * who discovers a vein or lode may locate a claim upon such vein or lode by defining the boundaries * * * and by posting a notice containing: * * * 4th. The number of lineal feet in length along the course of the vein or lode as near as may be."
>
> "Sec. 2424. Any locator after having established the boundaries of said claim * * * may file with the district mining recorder a notice of location setting forth the name given to the lode or vein, the number of linear feet claimed in length along the course of the vein, the date of location," etc. * * *

The Salt Lake No. 3 location notice (Record, p. 570) recites that the locator

> —"hath this day located and claimed 1500 feet on this lode or ledge running in a northerly direction 255 feet from this monument and in a southerly direction 1245 feet. I also claim 300 feet on each side of center of lode with all spurs and angles, etc."

By comparing this notice with Nev. Stat., Sec. 2424 supra, it does contain what the statute requires it to contain, in this viz: the number of linear feet in length along the course of the vein. If this does not denote discovery of the lode or vein, the writer does not understand language, for how could one make the statutory declaration who has not seen the vein. The recorded notice must therefore have an evidential value commensurate with what the statute authorizes it to contain. Just as an affidavit of annual labor is by statute made prima facie evidence of performance of the labor.

Of course a recorded notice or certificate is not requisite to a valid location at all in Nevada, but the facts of location may be otherwise proved (Gibson vs. Hjul, 32 Nev. 360; 108 Pac. 759-61), just as the performance of annual labor may, without the recorded affidavit. But when there is a record made in conformity to the statute, the record may be resorted to to make a prima facie case. And the record was designed for much the same purpose in each case, *i. e.*, to guard against loss of evidence by death and disappearance of witnesses as well as to give notice.

But petitioners have cited two Nevada cases to the contrary on their page 11. They are not in point. The first case, Rd. Mtn. Min. Co. vs. Min. Co. 36 Nev.; 138 Pac. 71, was the case of a claimant under a recorded location notice against the claimant under a subsequent United States patent. Certainly no one will contend that a mere prima facie effect of a recorded notice will avail against the conclusive effect of a U. S. patent. The same thing could have been said in another way by holding that any mining location however well authenticated the acts of location will be vacated and lost by the failure of the owner to adverse and bring suit against a subsequent patent application, as required by U. S. Rev. Stat., Secs. 2325-2326.

In the other case cited, Fox vs. Myers, 29 Nev., 86 Pac. 793, the point decided was not as to the effect of a *recorded notice* at all, but of a *posted notice*, as this Court will see by reading the case. And in general it accords more with respondent's contentions than with petitioners'. For while near the bottom of column 2, page 797, the Nevada Court cites Lindley's 2nd edition, Sec. 392 (also cited by petitioner) to the point that a notice is not evidence because statutes have not made it so, yet further down in that column and on next page a different idea appears to carry. There the Court observes that while there is little evidence of any real discovery on the ground by either party, yet as the junior location notice was *posted* at the same point

on the ground as where the senior claimed discovery, this would *warrant the presumption of the existence of a discovery*, and the Court would not weigh scales to determine the values as between the claimants. This shows that mineral discovery is sometimes presumed without affirmative proof thereof. Notice also that the obiter reference therein to Lindley, Sec. 392, is to the second edition, where no authority or decided case is cited by the author to his support, but is Lindley's curbstone opinion that notices are not evidence. The author could not have had Nev. Sec. 2424 before him at the time, nor the decisions we have cited supra.

But if counsel would contend that a decision of the Nevada Supreme Court upon the effect of a posted notice is the same in effect as one upon a recorded notice, since a statute provides for each, then we would say that in Erhart vs. Boaro, 113 U. S. 527, this Court has decided that a location notice reciting a location on *"this lode, vein or deposit"* (parallel to the Salt Lake No. 3 notice) is a sufficient notice.

And the same Court (Nevada Supreme) held in Mining Co. vs. Min. Co., 15 Nev. 383, that a recorded location certificate is evidence of discovery, and when supplemented by some evidence of the present existence of veins, amounts to proof of former discovery. Yet the recitals of a statutory location certificate in Nevada are the same as those prescribed for a statutory notice in this respect, viz: It must recite the number of linear feet in length along the course of the vein and the width on each side of the center of the vein (Sec. 2424), and the Salt Lake No. 3 notice contains both of these recitals.

Petitioners cite Childers vs. Latham, 142 Pac. 924, which is not in point because the statute considered in that case did not prescribe the recitals in the notice, nor any recitals as to a lode or vein.

Thomas vs. Min. Co., 211 Fed., is also cited, but is not in point, because that was a case of a still stronger counter presumption or evidential value arising in favor

of rights under a prior grant, and is in line with the holding of the U. S. Supreme Court in the cases cited on page 355 of our brief, Ex. A, herewith. There are always varying degrees of strength and cogency to proofs as well as presumptions, and one element will yield to another of greater strength and cogency or conclusiveness. We are discussing prima facie evidential values, not conlusiveness.

We fear to have given unnecessary space to this subject of the effect of the recorded notice as evidence in favor of the validity of the location, but petitioners have laid emphasis upon it. And it is the only point in their brief upon which they allege there is a conflict of decisions that needs the attention of this Court. They say there is a conflict of holding on this point between the Ninth Circuit Court of Appeals in Vogel vs. Warsing, 146 Fed. 950, and in the cases at bar, and the holding of the Nevada Supreme Court. And we have shown that no such conflict exists. But if it did, it would be upon a mere rule of evidence of no general interest or importance, which this Court is not authorized to review under the decisions cited on pages 2-3, *ante*. If so, Congress had as well discharge the Court of Appeals altogether and let this Court do all the work, with all that that means. Or else repeal those provisions making the judgments of the Court of Appeals final in certain classes of cases.

And even in these cases at bar, the point is of no controlling importance and can not affect the conclusion reached. It may be stricken out entirely without affecting respondent's case. For the same presumptions of validity and title flows from proof of actual prior possession of the ground under claim and color of title, as this Court has decided in Campbell vs. Rankin, 99 U. S. 261; 25 L. Ed. 435.

Actual Possession by Respondent. Besides the prima facie presumptions and evidential value of the recorded location notice of the Salt Lake No. 3, the

evidence was undisputed throughout the record by both petitioners and respondent that respondent and his grantors were in the actual possession of the ground at the time of the alleged junior and conflicting Guy Davis location in 1913, and had been so in possession ever since its location, February 2, 1897. See testimony as to discovery, staking, posting, etc., and abstract with record citations in brief, Ex. A, pp. 102-105, 161-182, 187-192, 283-286, 480-490, and decisions of this Court and other Courts cited in Ex. A, on pp. 290-309. And see infra, pp. 22-27, *ante*. All annual assessment work fully performed and unquestioned; highly improved with valuable buildings, mill, expensive roadway blasted from solid rock in the mountain side, and excavations on the ground, besides a 1000 foot tunnel and another 300 foot tunnel, and another 75 foot tunnel on other parts of the Copper Canyon group, said to be for the common benefit of all the claims. A custodian in charge residing in one of the houses on the Salt Lake No. 3. We need not further quote; the record speaks for itself at the above page citations in Ex. A.

Actual possession under color of title is presumptive evidence of title and a valid location.

> Lebanon Min. Co. vs. Min. Co., 6 Colo. 271-2;
> Campbell vs. Rankin, 99 U. S. 261, 25 L. Ed. 435;
> Cases Cited in Brief, Ex. A, pp. 290-309.

The element of mineral discovery is included within the meaning of a *"valid location."*

> Creede C. C. & M. Co. vs. Uinta T. M. & T. Co., 196 U. S. 353-4, 49 L. Ed. 510, Col. 2.

So that we have a presumtively valid location in the Salt Lake No. 3, with or without the recorded location notice, at the time petitioners attempted to enter and make conflicting location.

In this connection we notice the allusion at top of page 4 of the petition for certiorari, to the Act

of Congress of March 3, 1881, 21 Stat. L. 505, which provides that if title shall not be established by either party the jury shall so find, and judgment shall be entered accordingly. But this statute does not purport to repeal or modify the rules of evidence, nor the evidential value of certain proven facts, nor the presumptions which the Courts are authorized by law to draw therefrom; nor the burdens of pleading and proof. Each side must prove his own case certainly, but neither side is obliged to surrender the benefit or avoid the burdens of the rules of law and evidence in so doing.

> "It is not the intention of this statute (25 Stat. L. 505) to change the methods of trial, but its manifest object is to provide for an adjudication, and permit the party who is determined to be the rightful owner to receive his patent, and deny it to the other if he has failed to make out his case."
>
> Perego vs. Dodge, 16 Sup. Ct. Rep. 971-4, 163 U. S. 160.
>
> "The object of the statute was to provide in case of total failure of proof of title, for an adjudication that neither party was entitled to the property, so that one party could not obtain a patent simply because the other had failed to make out his case, if he also had failed."
>
> Perego vs. Dodge, supra.

These presumptions or the inferences properly deducible from proven facts are the presumptions spoken of by Judges Hunt and Ross in parts of their opinions complained of, which stand for evidence for a mining locator until disproved. But when held and worked for the time required by U. S. Rev. Stat., Sec. 2332, the presumptions are absolute. The judges made this distinction clear to the extent that they held that possession for the period of minitations to be a complete bar.

Petitioners admit on their page 4, however, that the burden was on them. But their sins of omission are many.

TESTIMONY AS TO ORIGINAL MINERAL DISCOVERY.

In addition to the recorded notice and actual possession, we have the affirmative testimony of the two miners who performed the manual labor of staking and posting the Salt Lake No. 3 and the other claims of the Copper Canyon group in February, 1897, (except the Midas, Evening Star and three others). They saw and examined the vein exposed in the shallow surface cut on the mountain side, which had already been opened when they did their work. They pronounced it a true mineral-bearing fissure vein, such as they would themselves locate were they locating a mining claim. See testimony cited to record in Ex. A, pp. 102-105, 187-192, compared with mining decisions of this and other Courts, Ex. A, pp. 198-203. This was all that was necessary to prove a locatable vein, and it was not necessary to have taken any samples or made assays at that time. (Cases p. 169 of Ex. A). The testimony of these two men, the Jory's, is undisputed anywhere in the record, and cannot therefore be gainsaid, regardless of whether an issue was tendered against the original mineral discovery. We have often besought counsel for petitioners to cite some evidence to the contrary in the various hearings of this case, but they have never complied. We ask them now if there is any evidence in the record on this point, or upon any other that we have not cited, or fairly covered in our brief, that they bring it to the attention of the Court, and to ours.

The original discovery cut of the Salt Lake No. 3 has since been obliterated, but this does not impair the location. (Cases, Ex. A, p. 351).

Subsequent Discoveries. But the same or other lodes and veins were subsequently opened and exposed at different points on the ground by shafts, cuts or excavations which antedated the petitioners' coming and attempted rival locations, but which were extended or enlarged in 1913 and 1914, before and after the latter

event. Besides a great deal of group work for the benefit of all the Copper Canyon group. See testimony cited to the record generally in brief, Ex. A, pp. 161-182, 431-443, 450, 479-489, 541-591.

All of this testimony is absolutely uncontradicted in the record from beginning to end. No witness undertook to dispute a line of it, or to say that respondent's witnesses did not go, see, or do aught of that to which they testified. Not one of the petitioners or their witnesses would testify that the fissures did not exist, with their upper and lower or foot walls, with included material of different character and value from the country rock; their apex, their strike and their dip into the earth. The fact that respondent's witnesses (disinterested mining engineers in case of Tibby, Liddell and others) had gone there and seen these things, and taken ore samples which yielded as high as $12 a ton in the precious metals, is nowhere disputed by any witness testifying for petitioners.

The petitioners themselves must have seen these occurrences, for they testified to the existence of fractures, faults and breaks in the country rock formation, having width between walls, strike, dip, and all the requirements of lodes and veins as judicially defined by the Courts, including the U. S. Supreme Court, but they differed only in their *conclusions*, or rather in their nomenclature, being willing to call them by almost any name but "veins and lodes." But a dispute as to names is nothing, and does not constitute a conflict of evidence as to the physical facts themselves. Especially when it appears that their sole reason for not wishing to call them "veins and lodes" was because the samples they themselves selected from the ground (not from within the vein walls) were unmineralized, and showed only "trace" in assaying. And also when it appears that they would not agree to call it a lode even though other samples fairly taken from within the veins, and fairly assayed by competent men, yielded assays as high as $10 or $12 a ton right at the surface. And not-

withstanding that the whole neighborhood is mineralized, which is competent evidence (Cases Ex. A, p. 630), and about 600 feet away is a valuable mine from which hundreds of thousands of dollars worth of ore had been shipped from extensive underground workings (Ex. A, pp. 385-392), and belonging to the same group.

All this is erroneous reasoning, if nothing worse, and a jury has no right to treat it as *evidence*, or as constituting a conflict. A jury does not have *carte blanche* when they go in a jury box, to devise any kind of a verdict they please, or to regard evidence as conflicting merely because witnesses have differed in their conclusions in matters of law or in names for that which they saw.

See cases cited on page 455 brief, Exhibit A.

"A vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral, or mineral-bearing rock, and the boundaries. With either of these things well established, very slight evidence may be accepted of the other.

"A body of mineral, or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such bodies, and to the extent of it, boundaries are implied.

"On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.

"Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a lode or vein."

Mining Co. vs. Cheeseman, 116 U. S. 529, 29 L. Ed. 712-14;

Iron S. Min. Co. vs. M. & S. Min. Co., 143 U. S. 404, 36 L. Ed. 204;
Snyder on Mines, Sec. 349;
Brief, Ex. A, p. 198-203, 393-414, 496-9.

Subsequent mineral discoveries are sufficient to sustain a mining location even where there is no original discovery at all, as against a subsequent attempt to locate. See cases cited in brief, Ex. A, pp. 456-472.

In view of this affirmative showing, both as to original and subsequent mineral discoveries prior to the coming of petitioners, not much need have been said about the presumptions from possession and the recorded notice. Presumptions might be set out of the case and still the Salt Lake No. 3 would have to be sustained upon the undisputed evidence.

CHAPTER VIII.

ADVERSE POSSESSION.

By the second affirmative defense (Rec., pp. 24-26) the respondent set up his title and right of possession by adverse possession for the period of limitations, under U. S. Rev. Stat., Sec. 2332, and the Nevada statute supplementary thereto, which is quoted on page 107 (brief, Ex. A).

The testimony in support of this defense is abstracted and cited to the record in Exhibit A, pp. 102-105, 181-182, as well as by the testimony as to lodes and veins elsewhere cited (Ex. A, pp. 431-432, 477-490, 540-591).

The mining decisions of this Court and other Courts under U. S. Rev. Stat., Sec. 2332, are collected and digested at length on pages 109-153 of brief, Ex. A, and cannot be gainsaid or avoided. They preclude every attempt at invalidating a mining claim for any alleged default or noncompliance with law in its initiation. Granting there has been actual possession and working for the required time, every act of location required by law is presumed to have

been performed by the locator. Such possession is declared to be the equivalent of a *valid location.*

And a *valid location* is declared by this Court, in Creede, Etc., Co. vs. Uinta, Etc., Co., 196 U. S. 353-4, 49 L. Ed. 510, column 2, to embrace the element of a mineral discovery.

By the force of the statute and decisions, the Salt Lake No. 3 lode mining claim, which before the running of the statute was sustained by prima facie and rebuttable presumptions arising from actual possession under claim and color of title, by the recorded location notice describing the length of the claim on the vein, and by the affirmative undisputed and non-conflicting testimony of competent miners who had seen and examined the discovery lode or vein in February, 1897, and by undisputed testimony of subsequent discoveries and exposures of vein and lodes on the ground before petitioners came—became sustained by absolute and irrebuttable presumptions of law which could not be overcome by any allegation or proof of non-compliance with law in any particular going to the initiation of the claim as a mining location.

Not an iota can be deducted from this statement without giving a judicial repeal to the statute itself (Sec. 2332), and reversing the settled decisions of this Court and of the other federal and State courts. Because if irrebuttability and indisputability be taken away, the sole distinction between mining claims before and after the bar of the statute is abolished, and any alleged ground of invalidity may be litigated as well before as after the bar occurred. But the decisions we cited preclude this. In those decisions every imaginable contention in avoidance has been completely met and answered in advance.

The statute, Sec. 2332, itself says that proof of the facts therein indicated shall be sufficient to establish a right to a patent. And when, in Reavis vs. Fianza, 215 U. S. 16, it was urged that these words carried into Sec. 45 of the Philippines mining act, meant

a mere right to apply for a patent, this Court replied that the right to a thing denoting title is a right to the thing itself.

In their petition and brief petitioners cite the dissenting opinion of Judge Gilbert below to the contention that the Nevada statute of limitations for mining claims (Sec. 4951) required something more than annual assessment work, and something more than the amount of improvements and development work shown by the testimony in this case.

We might mention at this point the record cited at pp. 161-182 of our brief, Ex. A, and at pp. 114-137 of Ex. No. 1 in its companion case (record No. 1873), shows a very large amount of money expended in development work and improvements expended on The Salt Lake No. 3, Midas and Evening Star lode claims during the year before the attempted conflicting claims by petitioners, consisting of from 100 to 115 feet of shafts and tunnel, a roadway and mill, leaching tanks, valuable buildings, etc., while on the adjoining claims additional work was done in a large amount by which these three claims might be benefited. The extent of the benefit to these claims by the work done on the other claims being for the jury to say. And in the 16 years previously such extensive development work as a tunnel, shaft and upraise 1500 feet in all, and another tunnel 300 feet long, had been excavated on other claims of the group which petitioner contended was for the benefit of all the claims of the group, including the three here. During any two of those years there was development sufficient to ripen title by adverse possession. But the trial Court took the whole subject from the jury by saying that neither adverse possession nor the performance of annual labor was to be passed upon by the jury, and that the performance of annual labor was not questioned by petitioners. It was not therefore for the trial Court or his Honor Judge Gilbert to conclude (without the jury) that there was not enough work done. Even the placer shafts alone cost around $700,

as the testimony showed, and this was held valid as development and improvements even on a lode claim, in Walton vs. Min. Co., 123 Fed. 209. And besides the annual labor required by statute no further work or development is required for that matter. Ore does not have to be extracted and shipped. See cases cited Ex. A, pp. 498-499.

But the suggestion that more is required because the Nevada statute of limitations relating to mining claims requires more, cannot avail in the first place, because U. S. Rev. Stat., Sec. 2332, is a complete expression of the congressional will on this subject in every particular except as to the length of time prescribed to ripen title by adverse possession. Congress desired that the length of time should be uniform in each State by federal and State law, and to that extent only deferred to the local legislatures. So held in Reavis vs. Fianza, 215 U. S. 16, 30 Sup. Ct. Rep. 1-3, the language referred to being near the top of column 2, page 3, of the latter publication. Sec. 45 in that case was copied from Sec. 2332, and Reavis vs. Fianza is a practical construction of both.

But the Nevada statute (Sec. 4951) does not really attempt to add any burdens to the "holding and working" prescribed by U. S. Rev. Stat., Sec. 2332. It merely provides that where a locator has held and worked his claim *"in the usual and customary manner of holding and working similar claims in the vicinity thereof."* This merely refers to the manner of doing the work, not to the extent or amount of work to be done. But it was not shown by the proofs in this case that the work done by respondent and his grantors was done in any unusual or extraordinary manner, or not in conformity to any vicinity custom. Certainly the Court cannot presume that some vicinity custom existed and further presume that such imaginary custom was not complied with in the manner of doing the work. The work itself is the important thing, and not the manner of doing it. But if the Court could properly speculate upon that subject it would result in a multitude of con-

flicting and incongruous decisions instead of that uniformity for which petitioners are presumably here contending, since no two Courts would agree in their conjectures as to what any local or vicinity custom is or should be on this subject. If there is any presumption it is in favor of regularity and due compliance.

If, therefore, our request for jury instruction contained this expression, copied from the Nevada statute, "in the usual and customary manner," etc., those words were mere surplusage in the absence of any evidence that there was a vicinity custom and that respondent had not complied therewith in the "manner" of doing his work. Respondent was entitled to a jury instruction without those words, and the inclusion thereof was a matter of which only he could complain, and which did not injure petitioners nor alter the legal equation deducible from the evidence.

CHAPTER IX.

OTHER SUGGESTIONS OF PETITIONERS ANSWERED.

"Long Continued" Possession. On their page 6 petitioners say that we asked no jury instruction as to the effect of long continued possession. But what is meant by "long continued" in this respect, and how long would be required to make one's possession "long continued" if greater time than two years prescribed by limitations is implied? Any longer time adds nothing to the conclusiveness of title and validity acquired by two years of possession and working. Any less time is not a "long time" in the sense that the prima facie presumptions of title and validity of location arising from "actual possession" (Campbell vs. Rankin, 99 U. S. 261, 25 L. Ed. 435) have not yet become conclusive. And the presumption of mineral discovery which is included in the term "valid location" (Erhart vs. Boaro,

113 U. S. 528) has not yet become an indisputable presumption.

And as for the difference between two years and less than two years in the scale of "long continued" possession, there was no conflict of evidence as to the length of respondent's and his grantors' continued possession having been longer than two years (16 years, in fact); so that there were no alternative inferences which the jury might lawfully draw, based upon which witness they might elect to believe as to the length of respondent's possession.

We asked an instruction on the effect of two years possession, and also a peremptory instruction. Also challenged the evidence to support the verdict, and the latter as against the law. These went to every inference the jury might lawfully draw from the evidence as given.

Discovery—Principal Issue. It is said in the dissenting opinion below that discovery was the principal issue. This Court will have concluded to the contrary e'er now. It was not an issue at all, and it could not be an issue, if the facts constituting adverse possession were proved by respondent.

Petitioners say there was no room for presumptions in view of the jury verdict. This can only be said of rebuttable presumptions prior to limitations, when an issue of invalidity is duly tendered. When limitations have run, it is error to refuse to instruct the jury accordingly, and to enter a judgment in violation of the terms of the statute.

A time comes in every transaction of life when a man's prima facie rights become absolute and may no longer be questioned. Criminal prosecutions are barred after a time, and so are every manner of civil actions. The filing of an adverse in the land office is barred after 30 days, and an adverse suit itself after 60 days more. (Secs. 2325-2326, U. S. Rev.) It would not be contended that they could litigate the issue of mineral

discovery after those limitations have expired. How can they after Sec. 2332?

And has not the same authority that enacted U. S. Rev., Sec. 2320, requiring discovery, the power to repeal, to modify, to restrict or waive it? And has not the U. S. Supreme Court the power to construe it? This Congress has done by Sec. 2332, by which after a time certain it waives contention and directs the patent to issue. This Court has construed the section time and again and declared that it means what it says. Who shall say then that Congress was not wise and should have kept alive disputes over mining locations when all other disputes have been laid at rest? A right so earned is the equivalent of a valid location, and a valid location includes discovery, as this Court has said.

They cite McCowan vs. McLay, 16 Mont. 234, 40 Pac. 602, that discovery is necessary, and that Sec. 2332 cannot operate where there is an adverse claim. But Cowan vs. McLay was not law because not in accord with Belk vs. Meagher, decided by this Court. It was impractical, because it would nullify U. S. Rev. Sec. 2332 entirely. For there would never be any occasion to resort to or plead the statute except where an adverse claim arose to the same ground. And if the bare assertion of an adverse claim would render the statute inapplicable, the Courts would have nothing whatever to do with Sec. 2332. Neither would the Land Office. But the U. S. Supreme Court has sustained a plea of the statute in several cases, as we have shown. And if there is no adverse claim filed in the Land Office, there cannot be any adverse suit in the Courts, nor any plea of the statute. Such an adverse claim, if filed in the Land Office, would not be a valid one, of course, if it could be overcome by a plea of Sec. 2332, because a valid adverse claim could not co-exist with a valid defense thereto under Sec. 2332. Yet the bare assertion of a wrongful "adverse claim" would, in petitioners' view, defeat in advance any reliance upon U. S. Rev. Stat., Sec. 2332. Whereas, the U. S. Supreme Court held,

in Reavis vs. Fianza, 215 U. S. 16, that there cannot be any valid "adverse claim" initiated upon mining ground, the title to which has been perfected by adverse possession under Sec. 45 of the Philippines mining act, which was copied from said Sec. 2332. See also Ex. A, pp. 151-2, and this Court in Willis vs. Min. Co. in 127 U. S. 471, 32 L. Ed. 172.

They cite Humphreys vs. Idaho G. M. D. Co., 120 Pac. 823, 826-7. We have often answered this case before (see Ex. A, pp. 148-150). The closing sentence is dictum pure and simple, not necessary to the decision on demurrer, and cannot avail against the decisions of this Court and the other Federal and State Courts.

In Oil Co. vs. U. S., 245 Fed. 521, which they cite, adverse possession was not an element, nor was the controversy between conflicting mining claims, but the U. S. as paramount owner withdrew the offer before a mineral discovery occurred, and therefore before acceptance.

Petitioners say that Belk vs. Meagher, 104 U. S. 279, cited by respondent, is inapplicable, because they say there was a vein or lode and a mineral discovery shown in that case, whereby Sec. 2332 could operate. We reply that there was a vein or lode *in the ground*, as denoted by the wording of the opinion, just as there are proven lodes and veins in the ground in dispute in the two cases at bar, but no *mineral discovery* by Belk in whose favor this Court held that Sec. 2332 would operate nevertheless. For this Court held that all of Belk's acts of location were as though they had never been performed at all, because he had entered upon the ground of another, and at a time and place he was not authorized by law to make a discovery or location. Yet without a discovery or location which the law would regard as such, and with only a bare wrongful possession to his credit, this Court held that if Belk had kept himself in possession and

kept others out for the period of the statute of limitations, he would thereby obtain a valid location, regardless of his adjudged failure to make a discovery or location. Petitioners cannot say in retort that the jury found a verdict against us; for the jury never found that there are no lodes or veins in the ground, but only that we did not discover them. And they made that finding because they had been told by the trial Court that it did not matter how large and valuable are the lodes and veins in this ground, and because the Court excluded much evidence of such existence, size and values as immaterial. Transferring to respondent the burden of showing actual knowledge thereof by his grantors, whereas the burden was by law placed upon petitioners to show that respondent's grantors did not have knowledge of them, which burden they say on their page 6 they assumed.

To say that they assumed this burden is to confess that they ought to have assumed it, and to confess error in the Court rulings relieving them of that burden and placing it upon respondent, as shown in our brief, Exhibit A, herewith, on pages 607-650, especially at pages 611, 623-4, 632-4, 637-8, 641, 643, 646. These objections and rulings are also inconsistent with petitioners' brief, page 28, for certiorari, where they say that so long as the vein exists the federal statute is satisfied, and that proof of existence may be such as to establish the fact of discovery. Respondent says, of course, that his undisputed evidence proves both existence and original discovery as well as subsequent discoveries, as matter of law. But respondent further says that petitioners cannot have the benefit of a contention here that there was no lode or vein, or no prior discovery thereof by respondent or his grantors, and that they cannot avail themselves of the verdict; because they obtained it by the wrongful exclusion of testimony according to their own present contention on their page 28, and according to the decisions respondent has cited. And the error is duly assigned.

So we go back to the point under discussion above, viz: that in Belk vs. Meagher there was a valid locatable vein or lode in the ground, but Belk had never in legal contemplation discovered it. Yet without a discovery or location, he would acquire both by holding possession for the period of limitations under Sec. 2332, and keeping others out—the equivalent of a valid location. And Belk vs. Meagher is applicable here upon the most favorable view of the petitioners' contentions as to the facts and verdicts. In the Belk case there was no wrongful exclusion of evidence of the existence of veins, but its existence was taken for granted. At bar the petitioners must do the same, because they cannot exclude evidence of the existence of veins, and also have the benefit of a contention that such veins do not exist. And this entirely independent of the fact that adverse possession under U. S. Rev. Stat., Sec. 2332, is a complete bar to inquiry upon any question going to the initiation of a mining claim, as this Court has held in Belk vs. Meagher, supra; Mining Co. vs. Willis, 127 U. S. 471; Reavis vs. Fianza, 215 U. S. 16.

The effect of Lavagnino vs. Uhlig, 71 Pac. 1046-7, 198 U. S. 443, both in the Utah Court and in this Court is considered on pp. 144-6 of brief, Ex. A, herewith, and need not be repeated. Besides this Court has since spoken in Reavis vs. Fianza.

It is claimed that one or two of our requests for instruction on adverse possession included the element of mineral discovery. If so, neither of them were given to the jury by the trial Court, and the verdict was not influenced thereby. No exception was taken or error assigned to such refusal, and they were no part of the law of the case. Neither side is affected thereby.

As we have seen, mineral discovery is conclusively presumed in support of *"a valid location"* (third defense and undisputed facts thereunder). The requests applicable to this defense, to the refusal of which exceptions were taken, excluded discovery as a subject for a jury finding, because discovery was already established in law

by the facts proved, and the jury were not at liberty to find the contrary in the face of adverse possession. Under the second defense, on the other hand, adverse possession was not an element. If, in the hurry of the trial, requests were framed which seemed to blend the two defenses, and the Court refused to give them, and both sides acquiesce, those requests are removed from further consideration.

The Opinions. And while it is possibly true that in the course of the opinions in the Circuit Court of Appeals the judges discussed the presumptions (those that were prima facie and those that were indisputable) rather indiscriminately, and did not at all times distinguish clearly between the considerations governing the two defenses; yet it is manifest that they intended to and did hold that the presumptions incident to limitations were a *complete bar;* that the latter could not be overcome by allegation or proof, in conformity to the decision of the Supreme Court of Nevada, in 9 Nevada, 240, which they cited and approved. Otherwise they would not have reversed, so far as adverse possession was concerned. We file herewith copies of our brief upon rehearing in the Court of Appeals, which is devoted to the contentions then urged by petitioners in this connection.

CHARACTER OF ACTION.

Parenthetically, the greater part of the leading opinion by His Honor Judge Ross, in the Court of Appeals (249 Fed., pp. 80 to 91) woud seem to be devoted to a consideration of the nature of the action, which is pertinent in determining the sufficiency of the complaint and the evidence as considered on pages 16-28 hereof. But in so far as it related to the nature of the appellate remedy adopted, as between the propriety of appeal or writ of error, it was probably unnecessary in view of the Act of Congress approved October 6, 1916 (39 Stat. L. 927) enacted but not yet published when the appeals

and writs of error were sued out in these cases in December, 1916.

Testimony Cited. On Petitioners' page 20 they cite certain fragments of testimony to the record. The first statement, by Healey, is of the class considered on pp. 35-39, *ante*. It relates not to what the locator of the Salt Lake No. 3 discovered or saw on February 2, 1897, on which he based his location, but what Healey himself saw in September, 1913, at a different place on the claim. And even as to what he saw himself, his testimony is modified and his conclusions controlled by the other testimony of himself and his other witnesses produced by him at the trial. See record citations to Healey's testimony in Ex. A, pp. 335, 385, 530-539, and his other witnesses associated therewith and on pages 380-1. And by their failure to dispute the facts testified by respondent's witnesses as cited to the record in Brief, Ex. A, pp. 431-443, 450, 541-591. The veins were there, but it was commercial ore on the surface of the ground that they wanted. And not seeing it in the particular samples they selected from certain rock surfaces not within the fissures, and while preparing themselves to jump the ground, they concluded there were no veins. And it was these "*conclusions*" they retailed to the jury in lieu of evidence as to facts. And because the undisputed *facts* conflict with their *conclusions*, they want a holding here that there was a conflict of evidence. But this whole subject relates to the question of a prima facie location and the prima facie presumptions. These are precluded by the absolute presumptions and respondent's title by adverse possession. And, also, by the form and legal effect of their relocation notice. See page 14, ante.

MINING OPERATIONS.

They further cite, on page 20, that there has been no lode mining operations on the Salt Lake No. 3, Midas and Evening Star mining claims. That there

has been a tunnel 50 to 75 feet long in solid rock upon a vein in the Midas is not questioned; nor that a number of shafts and open cuts in the solid country rock disclosing veins, fissures, seams, breaks and a number of other names have been made on the Salt Lake No. 3, Midas and Evening Star claims; all prior to the petitioners. And the facts testified as to the original discoveries are not disputed, except in opinion or conclusion only, and by witnesses who never saw what the locators saw, so as to form an opinion.

But what they contend is that respondent and his grantors have never actively or continuously gotten out and shipped ore to the market from these particular lode claims. What they insist is that where an owner has a group of 20 or 25 mining claims, he has not only got to discover the lodes and veins in each, but he has to open up, develop, and ship ore continuously to the smelter from each of the claims, or else lose the ones from which mining and marketing of ore does not duly proceed. In other words, whenever one sees a piece of property that he thinks the owner is not for the time being making as good a use of as he thinks they could make of it, he is at liberty to take possession of it and appropriate to his own use. This may sound like good law to petitioners, but we doubt if it does to this Court. To the writer it sounds rather Bolsheviki. It certainly is not good mining.

It takes a lot of money to open up most any mine, and get it on a paying basis, and to a point where the owner can begin to take out ore and ship it. A certain amount of "dead work" calls for capital to begin with. A certain point on a group of claims is selected as a matter of engineering advice; the vein at that point is opened and developed; the ore is "blocked out" to begin "stoping," and mining and shipment begins, so that the returns may begin to defray cost. Often this process serves to connect the other mines by underground working which have paid their own construction and a profit from the ore mined therefrom. Or, the owner

or operator may go "broke" before he gets the mine on a paying basis. He may encounter unforeseen difficulties in his development, which technical advice could not adequately guard against. So baffling are mining and geological questions, and so risky the business of mining at best. It never was heard of that this "dead work" of opening and blocking out the ore has got to be performed and the inherent risks duplicated simultaneously on all the claims of the group and ore shipped from all to save the title to all. The expense of such a program would be ruinous and prohibitive. No one would venture their capital on such a program. The law has not required it. Cases cited Ex. A, pp. 498-499.

Grounds for Certiorari. No grounds are shown by the petition. As the cases cited, pp. 2-3, ante, hold, there must be some special ground to justify resort to this writ, in cases where by law the judgments of the Circuit Court of Appeals are made final. It is not sufficient that mere error is alleged, but the point involved must be one of peculiar gravity or general importance, as well as to secure uniformity of decisions. Cases of this class usually involve a public treaty or the foreign relations of the country. No conflict of decisions is alleged in any matter even of purely private interest and importance, save in one particular, and that is as to the legal effect or evidentiary value of a recital of a vein or lode in a recorded location notice (petition, p. 11). We showed on pp. 46-50, ante, that no such conflict exists, and that if it did, the point is immaterial, because we have the same prima facie presumption arising from respondent's actual possession of the ground under claim and color of title. And that a presumption of a valid location carries the presumption of mineral discovery and of all facts necessary to validity. Such a presumption must be met by allegation and proof, to overcome it. Either of these prima facie presumptions might have been laid aside, and still there was affirmative evidence both of original and subsequent mineral

discoveries. These could not be overcome except by both allegation and proof to the contrary. Neither was produced by petitioners. There was no issue of invalidity tendered in their complaints, and if there had been, the inquiry was barred by limitations under U. S. Rev., Sec. 2332, as we have shown. And they were further barred and estopped to assert invalidity by the form and effect of their relocation certificate, as stated before (ante, p. 14). So the alleged conflict of decisions, if it existed, is upon an immaterial matter, which could not control the decision of this case.

> "The Circuit Courts of Appeals were created for the purpose of relieving this Court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern and delayed suitors in the pursuit of justice."
>
> In re Woods, 12 Sup. Court Rep., 417-418.
>
> "But in the interest of jurisprudence and to secure uniformity of decision, provision was made under Sec. 6 of the Act for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in *controversies involving weighty and serious matters.*"
>
> Id.

And this Court in that case declined to review a judgment involving the effect of dismissal in a former suit, and questions of the law of master and servant, as not weighty or serious.

The object of the Court of Appeals Act was to make the judgments of that Court final except in extraordinary cases.

> American Con. Co. vs. Ry. Co., 3 Sup. Ct. Rep., 758-63.
>
> "Certiorari will not be granted to review a judgment of the Circuit Court of Appeals where the case, however important it may be to the petitioner, does not involve any question of gravity

or importance, there being no conflict of decisions or international relations concerned."

Fields vs. U. S., 27 Sup. Ct. Rep., 543.

Cases infra, pp. 2-3, ante.

The statute making judgments of the Court of Appeals final in certain cases may as well be repealed, and this Court may as well prepare to take over the reconsideration of all the judgments of that Court, if certiorari can be resorted to in all cases where there is no appeal or writ of error allowed.

In addition, there are many other errors assigned and discussed in the brief, Ex. A, either of which would have necessitated reversal of the trial Court judgments, but we need not repeat them here. We ask that the petition for the writ of certiorari be denied, but that if entertained, adequate bonds be required as a condition to supersedeas (pp. 8-10, ante).

PAUL G. ELLIS,
EDWIN W. SENIOR,
Attorneys for Respondent.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH RALPH,
Plaintiff in Error,

VERSUS

GEORGE A. COLE, ET ALS.,
Defendants in Error.

No. 2952

Involving the claim of Defendants in Error to the Guy Davis Mining relocation as against the Plaintiff in Error to the Salt Lake No. 3 lode mining claim.

BRIEF FOR PLAINTIFF IN ERROR

P. G. ELLIS,
208 Boston Bldg.,
Salt Lake City, Utah.
Attorney for Plaintiff in Error.

CONTENTS.

	Sections
CHAPTER I—Statement of the Case	1- 39a
CHAPTER II—No Title, Possession, or Right of Action in the Plaintiffs	40-112
CHAPTER III—Defendant's Title by Adverse Possession	113-173
CHAPTER IV—Defendant's Title by Regular Mining Location	174-212
CHAPTER V—The Placer Deposits	213-226
CHAPTER VI—Resume, of Foregoing	227-228
CHAPTER VII—The Complaint, Insufficient to Constitute a Cause of Action	229-271
CHAPTER VIII—The Evidence,—does not prove vacancy, unoccupancy, etc. of the ground at the time of the junior location	272-306a
CHAPTER IX—The Evidence,—does not prove Unlawful or Actual Ouster or Dispossession, or at all	307-319a
CHAPTER X—The Evidence,—does not Disprove Mineral Discovery in the Prior Lode Claims	320-509
CHAPTER XI—Nonsuit	510-520
CHAPTER XII—Errors in Admitting Evidence or Testimony for Plaintiffs	521-562
CHAPTER XIII—Errors in Refusing Proper Cross-examinations of Plaintiffs' Witnesses	526-580
CHAPTER XIV—Errors in Excluding Questions and Testimony for the Defendant	563-580a
CHAPTER XV—Errors in Refusing Jury Instructions	581-585
CHAPTER XVI—Errors in Instructing the Jury	586-607
CHAPTER XVII—The Verdicts	608-618
CHAPTER XVIII—The Judgment	619-622
CHAPTER XIX—General Relief Asked	623-628
CHAPTER XX—Assignments of Error	629-693
CHAPTER XXI—Index	694

STATEMENT OF THE CASE.

SECTION 1. These are twin controversies coming up on review from the judgments of the District Court of the District of Nevada in actions numbered 1872 and 1873 at law on the docket of that Court, and arising from the following facts:

In the year 1914, Plaintiff in Error filed his application No. 1544, Survey No. 4175 in the U. S. Land Office at Elko, Nevada, for a mineral patent for the Copper Canyon group of mines situate in Battle Mountain Mining District, Lander County, Nevada, consisting of the Salt Lake No. 3, Midas and Evening Star, and some thirteen other unpatented lode mining claims, besides some patented claims.

Against such application, as to the Salt Lake No. 3, Midas and Evening Star, Frank J. Healey, Murray Scott, George B. Thatcher and William Forman filed an adverse as claimants of the Homestake Placer claim, for alleged conflict therewith, and began an action in the District Court of Lander County, Nevada, in support thereof. Said action was removed by Defendant into the Federal Court for Nevada, where it became No. 1873 at law as above, but in the complaint the alleged conflict with the Salt Lake No. 3 was eliminated, and the Midas and Evening Star alone sought to be litigated.

And against said application as to the Salt Lake

No. 3, Guy Davis, Noah Faubert and George B. Thatcher filed an adverse as claimants of the Guy Davis re-location, for alleged conflict therewith, and began an action in the District Court of Lander County, Nevada, in support, which was removed by Plaintiff in Error into the Federal Court, and became No. 1872 at law therein.

At the opening of the trial, on plaintiffs' motion the present defendants in error were substituted parties plaintiff in both actions in lieu of the original plaintiffs, subject to objection reserved by defendant for any defect that might appear upon the submission of their record titles in evidence.

Thereupon by agreement of parties, both actions were tried together before a jury upon the same evidence. Verdicts in each case were returned for Plaintiffs below, upon which separate judgments were entered and motions for new trial denied, and Plaintiff in Error has brought the judgments here for review upon writs of error, and also as a precaution has appealed, in each case.

Case No. 1872 below (Guy Davis claim vs. Salt Lake No. 3) thus becomes No. 2952 on the docket of this Court. And Case No. 1873 below (the Homestake vs. Midas and Evening Star) is No. 2953 in this Court.

SECTION 2. A description of the mining ground in question, and a statement of the inception, origin,

title and history of the respective mining claims involved herein, on both sides, will aid a right understanding of the controversy.

The Copper Canyon group of mines owned by Plaintiff in Error, are old lode mining claims of many years' standing. There are about twenty claims in the group. Of these, the Virgin, the Maria Louise and Mountain Rock, and perhaps another of the claims were patented to the grantors of Plaintiff in Error many years since.

The *Salt Lake No.* 3 was located by Clive and Johnson on February 2, 1897, location papers duly recorded, reciting therein a lode or vein in the ground, and together with the John-John, Lucy, Reona, East Superior, Lake Superior No. 1, Salt Lake, Salt Lake No. 1, Salt Lake No. 2, Salt Lake No. 4, Ethel C. and Washington lode claims of said group, which had also been previously located, and the patented three or four claims, were on April 9, 1898, conveyed to the grantor of Plaintiff in Error, The Glasgow and Western Exploration Company, for the sum of SIXTY THOUSAND DOLLARS, including the equipment, engine, buildings, pumps, pipe, timbers, blacksmith shop, tools, tracks, tracking, materials, cars, bins, tanks, rigs, ore houses, ore dumps, offices, boarding house, stables, assay offices, cabins, and all buildings formerly owned by the old and new Battle Mountain Mining Companies, also certain water rights, pipe line, etc., by deed with full covenant of warranty of

title and possession as to the patented claims, and with *warranty of possession* under and *by due location* of the unpatented claims and by performance of all required annual labor thereon, and that the title was free and clear of all encumbrances; and sundry other warranties of title and possession.

SECTION 3. Of the remaining units of said group, the Midas and the Evening Star lode mining claims were located by Joseph Jurey and William T. Jurey on March 27, 1907, upon ground contiguous to the south end of Salt Lake No. 3, and the location certificates of each claim, reciting discovery of a lode or vein therein were duly recorded in the proper public records of Lander County, Nevada. And together with the Blue Jacket, Yellow Jacket, and Eagle lode claims, located about the same time, were conveyed to Joseph Farren for THREE THOUSAND DOLLARS and by him to said The Glasgow & Western Exploration Company, grantor of Plaintiff in Error.

All the location papers and title deeds are duly recorded in the office of the County Recorder of said Lander County, Nevada.

SECTION 4. The Glasgow & Western Exploration Company upon acquiring title in 1898 conducted more or less extensive operations on and development of said lode mining claims from thence down to and including 1913. During some years of said period the operations

and development would be extensive, and in other years less so; some time having a great many workmen, and at other times a few, or two or three, but always and at all times having some workmen, and with a watchman at all times present and residing in one of the houses on the Salt Lake No. 3 with custody and supervision over all the mines, workings, buildings, tools and property of the Company; and during all of said period and to the present, the annual labor and assessment work has been fully kept up and performed upon each one of said lode mining claims. There was no dispute about this fact, and Plaintiffs below made at the trial no contention as to any forfeiture of the claims, as the Court explained to the jury.

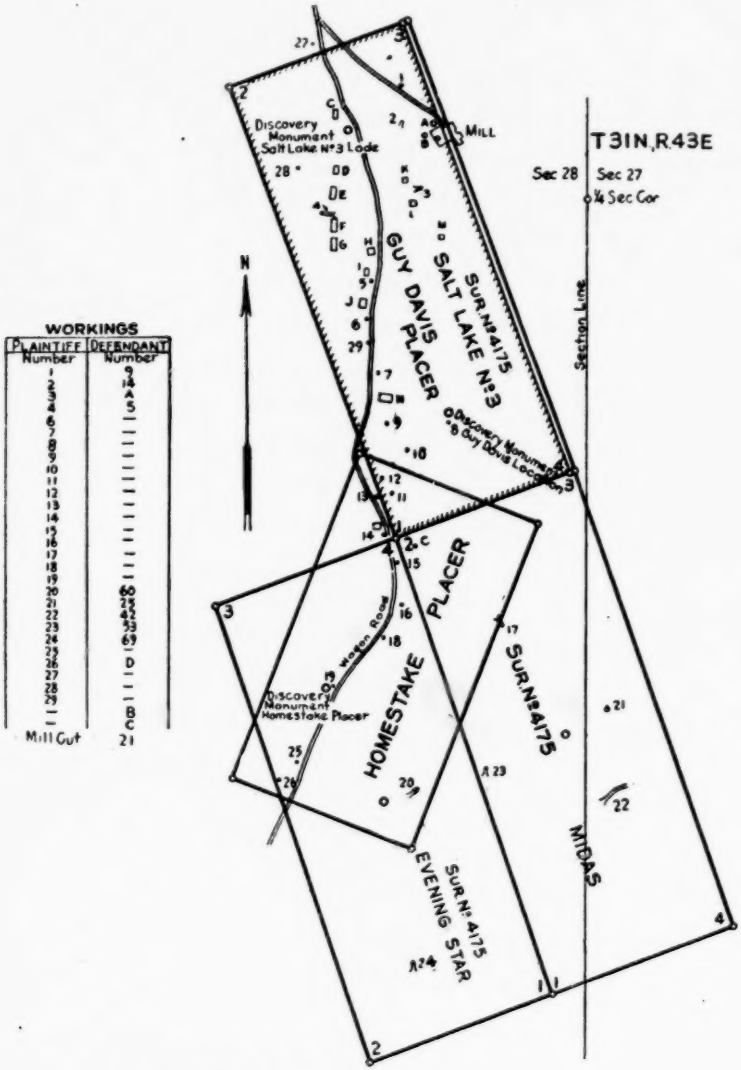
SECTION 5. In addition to the houses and improvements already upon said mining claims at the time of their purchase by the Glasgow and Western, which were old ones, the Company also constructed after its purchase, new buildings, bunk houses, boarding house, mill and tanks for the treatment and reduction of ore, roadways, tunnels, shafts, drifts, open-cuts, cross-cuts, etc., disclosing lodes or veins of mineral-bearing rock upon each of said lode mining claims. The houses, mill, tanks, etc., were located for the most part on Salt Lake No. 3, but part of the mill was also upon Salt Lake No. 4 ground, adjoining it. The value and cost of said buildings is many thousands of dollars.

SECTION 6. Aside from the question of annual labor, which it was admitted and not disputed has been kept up and performed on all of said mining claims, said group of mining claims were operated and developed as a group, under a scheme of development intended for the prospecting and development of all the claims, and certain other work was for the improvement of a portion of the claims combined, while there was other work done on the individual claims separately. There was one tunnel or adit into the mountain one thousand feet long; another one about 300 feet long; and other openings and excavations of varying lengths and depths. On the Salt Lake No. 3 Midas and Evening Star, the underground workings had not been extensive, but sufficient, and lodes or veins of mineral-bearing rock in place are disclosed in workings at and immediately under the surface of the ground, on sundry parts of the three claims. And as the Plaintiff in Error offered to prove at the trial, more than one hundred thousand dollars had been expended for labor alone, independent of the cost of materials, supplies, tools and other requirements in the doing of said development work and constructing said improvements by said Company, during the years 1898 to 1912 inclusive.

SECTION 7. Topographically, the said group of mining claims are situated among the hills and mountains of the Battle Mountain Range, and generally eastwardly

from Copper Canyon, in said Battle Mountain Mining District, Lander County, Nevada. The surface of the ground is broken, rugged and precipitous in places. It is an old mining district and lode mining claims have been held and worked therein from the earliest times. The country rock of the canyon and district is highly altered, fissured and broken, showing evidences of volcanic or other internal upheavals, magmatic intrustions, and extreme alteration.

SECTION 8. The Salt Lake No. 3, the Midas and the Evening Star are in relative position the most westerly claims of the group. The bottom or drain of Copper Canyon traverses the westerly side of the Salt Lake No. 3 and the northwest corner of the Evening Star, and approaches a corner of the Midas, after the manner of the attached plat made from the Exhibits. The wagon road as shown on the map follows generally the bottom of the canyon. The central and easterly parts of the Salt Lake No. 3, and most of the Midas and Evening Star, lap upwardly on the eastern slopes of the canyon, while the adjoining claims of the group project still further into the hills and slopes of the Battle Mountain Range.

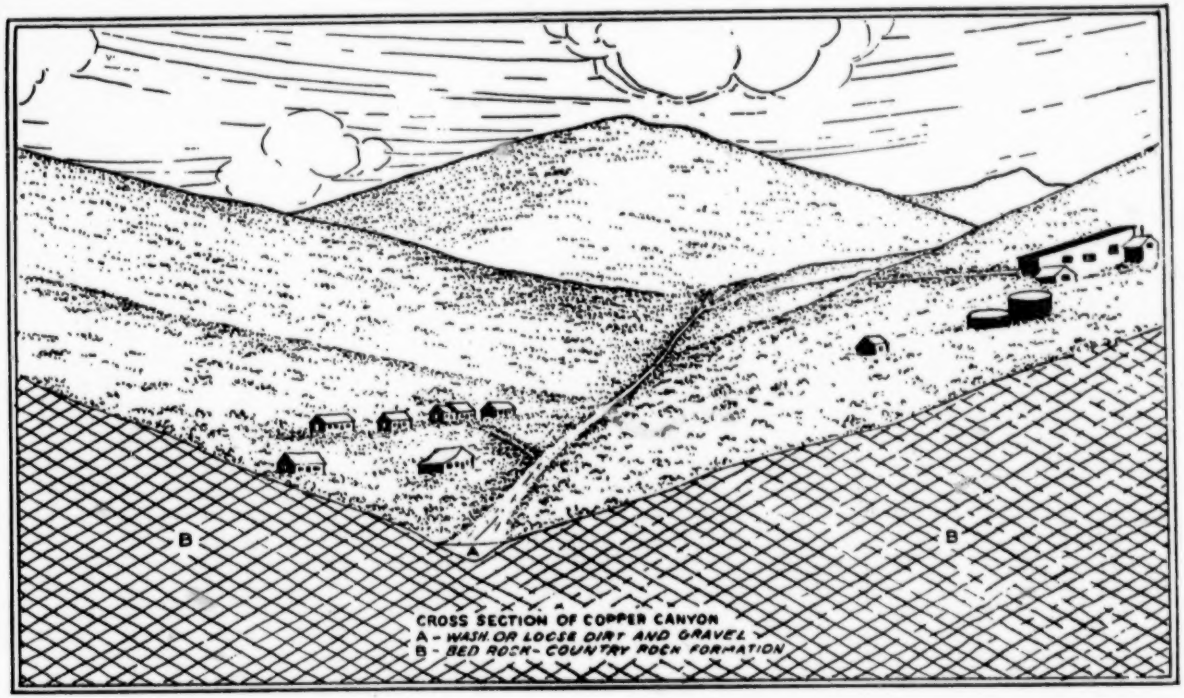


MAP OF MINING CLAIMS INVOLVED
COMPILED FROM
PLAINTIFF'S EXHIBIT 'A', DEFENDANT'S EXHIBIT '5'

SECTION 9. The surface of the Salt Lake No. 3, Midas and Evening Star lode claims are characteristic of the canyon and district generally, especially the eastern slopes, viz.: rugged, fissured and broken, containing veins and lodes, and general fissuring, fracturing and faulting of the formation, in which are contained the precious metals in appreciable quantities, many of them exposed at and near the surface of the ground, in the cuts, openings, tunnel, roadway and other shallow excavations. Some of these gave assay values of from 50c, 85c and $1.50 up to $8, $10 and $11 per ton at and immediately under the surface of the ground, with a tendency to greater values as depth is attained. While from some of the adjoining claims of the group much valuable ore had been shipped and marketed.

SECTION 10. The canyon itself is quite narrow at the bottom or channel thereof, its slopes converging to an angle or union at the bottom or bed rock, upon which the wash, detritus or gravel eroded from the surrounding hills rest to a depth of about 50 or 55 feet in the center, or over the channel or line of union of the two slopes at the bottom; while to the east and west thereof the wash or alluvian diminishes in depth with the acclivity of bed rock and with the slopes of the canyon as they recede, until no depth or practically no depth is reached at the lines of emergence of said slopes above the level of the floor of the canyon, and above said wash

or detritus. The width of said floor or surface of the wash or detritus in the canyon is from about 50 to 150 feet, from point to point in its course. The etching opposite and that at Section 474 hereof gives a good idea of these conditions on the ground.


B
A
B
CROSS SECTION OF COPPER CANYON
A - WASH OR LOOSE DIRT AND GRAVEL
B - BED ROCK - COUNTRY ROCK FORMATION

SECTION 11. The wash, alluvian or detritus in the bottom of the canyon, including the placer values therein, is material eroded from the adjacent hills, and from the lodes and veins of mineral-bearing rock therein.

SECTION 12. The original boundary monuments of each of said lode claims to-wit: The Salt Lake No. 3, Midas and Evening Star, are in place upon the ground where they were originally placed upon the location of the claims, and where they have always been since said times.

SECTION 13. The Plaintiff in Error and his grantors and predecessors are now and have thus been in actual possession and ownership of the Salt Lake No. 3 and 12 associated claims for about twenty years, and of the Midas and Evening Star with three associated claims, for about ten years, without forfeiture or abandonment, with assessment work admittedly done, and such possession and title has been undisturbed and unquestioned until the time of the trespasses presently to be mentioned.

SECTION 14. Extensive development work had been prosecuted on said group of claims, among other years, during 1912, but in the fall of that year work was suspended on account of the necessity for certain financial adjustments, and the property locally was left in charge and custody of the Company's foreman and caretaker, Joseph Jurey, who resided in one of the Company's

houses on the Salt Lake No. 3, in physical charge and custody of all its said mining claims, houses, mill, tools, machinery, with employment to hold and protect the same, perform or have performed all annual labor, and keep the boundary monuments up and in place, and such were the conditions at the time of the attempted conflicting locations next to be mentioned herein.

SECTION 15. During the summer of 1913, Plaintiff in Error was upon said properties as attorney in fact for the owner, and while so present in June or July, 1913, caused a shaft to be sunk in the channel or wash of said canyon on the Evening Star claim, at point "26" on the map (Sec. 8 *ante*) to one side of the center of the channel, sinking some 33 feet vertically, striking the bed rock or country formation on its slant or slope under the dirt, wash and gravel of the canyon, whence following bed rock off on an incline some 25 feet further to the bottom or channel at bed rock (See drawing, Sec. 474 *post*), and there discovered very rich and valuable gold placer deposits in the loose gravel or material at bed rock. And about the same time or shortly before, a like discovery was made by Christensen & Dahl on their ground south of and adjoining the Evening Star in the canyon. The pay streak, or zone of greatest concentration of said placer values is at and along the line of lowest depression in the bottom or channel of said canyon at bed rock, and for a few feet on either side thereof in

its course. The values of said deposits within the three claims has been testified to be at least $100,000 or up. Prior to said discoveries by Plaintiff in Error and Christensen & Dahl, the existence of said placer deposits in the canyon had never been known, or worked. Said placer deposits are part and parcel of the soil, and belong to the owner of the lode claims.

SECTION 16. Soon after said discoveries, the knowledge thereof became public and general, and the possession of the owner long peaceful, undisturbed, and unquestioned, soon became difficult and expensive to maintain. A great concourse of people, prospectors, saloon men, adventurers and undesirables, swarmed into the canyon, overran said mining claims, took up their residences in the houses on Salt Lake No. 3, and in tents provided by themselves, and pretended to prospect said ground in the canyon and in the connecting draws or arroyos within the lode claims, and then and there pretended to make discoveries upon said placer deposits in the canyon, which they previously knew had already been discovered and found to exist at bed rock in the channel of said canyon by Plaintiff in Error and said Christensen & Dahl, and then and there pretended to make new and rival mining locations upon the ground embraced in the Salt Lake No. 3, the Midas and the Evening Star, and many of the other claims of said group.

SECTION 17. In the ensuing bedlam, Guy Davis, one of the present defendants in error, with others, came upon the ground, and without pretense of right or authority of law, sunk a shaft in the wash and gravel of the canyon, at about point "14," shown on the map (Sec. 8, *ante*), and by tunnelling and cross-cutting invaded Plaintiff in Error's ground at or near the common corner of the Salt Lake No. 3, Midas and Evening Star, and were appropriating the values therein, when they were stopped by injunction from the Nevada Federal Court forbidding the same. Davis and his partner violated the injunction, were arrested, plead guilty of contempt, and imprisoned. Thereafter on September 5, 1913, while still under said injunction, and in violation thereof, Defendants in Error, Guy Davis and Noah Faubert, further entered upon said ground and pretended to make a mineral discovery upon the Salt Lake No. 3 mining claim, and to make a mining location thereon, under the name of the Davis lode claim, and in so doing practically adopted the exact boundaries and boundary stakes of the Salt Lake No. 3, and set their stakes down side by side with those of the Salt Lake No. 3 (See map, Sec. 8, *ante*.) In their location notice of said claim dated September 5, 1913, called the Davis lode claim, they asserted that they,

> "have this day re-located what is called the Salt Lake No. 3, on the ground of failure to comply with

the requirements of the law, said ground being claimed by The Glasgow & Western Mining Company."

Also:

"This claim shall be known as the Davis lode claim, and runs 1500 feet northerly and southerly, 200 feet southerly from the location monument and 1300 feet northerly; and 300 feet on each side of the location monument.

GUY DAVIS,
NOAH FAUBERT."

The point on the ground thus designated as the discovery monument is not in the canyon or on the placer deposits at all, but on the hillside slopes east thereof.

By the making of such re-location, said Faubert and Davis and all persons claiming the same, admitted the legal existence and validity of the Salt Lake No. 3 mining claim, and are in law estopped to deny the same, and are trespassers upon the possession of the owners of said Salt Lake No. 3 lode claim.

SECTION 18. Said Davis and Faubert, with others, thereupon entered on said Salt Lake No. 3 ground, and began again to excavate and carry away said placer values, and the grantor of Plaintiff in Error began another injunction suit against said parties in the Federal Court at Carson City, and an injunction was issued therein and is still in effect. On November 11, 1913, the Court's order to show cause why such injunction should not issue, was made, and on that same day said

Davis and another made a written contract with the Defendants in Error, Thatcher and Forman, who are attorneys at law, giving them a one-tenth interest in the net proceeds of all placer gold to be extracted by them from said ground, after paying expenses, in return for which said attorneys should defend them in the injunction proceedings and any other litigation arising, designed to stop the extraction of the gold or to punish the extractors.

SECTION 19. Except in the brief interval of time and on certain days between September 5, 1913, and December 1, 1913, said Davis, Faubert, et al., were never upon or into said ground, unless secretly, and have never at any time been in lawful possession of the ground. As trespassers they have succeeded in removing considerable placer values therefrom, and during said interval they sunk one or more shafts to bed rock from the surface of the Salt Lake No. 3, and one shaft just outside of and within a few feet of the west side line thereof, from which they drifted in. By reason thereof it has since been difficult and expensive to enforce said injunction.

SECTION 20. At about the same time, to-wit: On September 8, 1913, the Defendants in Error, Guy Davis, J. J. Healey and another, Murray Scott, also without authority of law, entered upon the ground within the exterior lines of the Midas and Evening Star, without the knowledge or consent of Plaintiff in Error on his gran-

tor, but with knowledge of said placer discoveries already made by him and by Christensen & Dahl upon said Evening Star ground and adjoining the same, and with knowledge of the already ascertained existence of said placer deposits at bed rock along the channel of said Copper Canyon, and then and there pretended to prospect and search for placer gold values in said ground, and to discover the same, and then and there the Defendant in Error, J. J. Healey, and said Murray Scott, pretended to make and file a mining location upon said ground on Sept. 8, 1913, calling it the Homestake placer location; and said parties then and there and between said date and December 1, 1913, sank one or more shafts to bed rock from the surface of said Midas and Evening Star lode claims in the channel or wash of said Copper Canyon, and began to and did extract large placer values therefrom until stopped by writ of injunction on behalf of Plaintiff in Error's grantor issued and served during said time, and still in force.

That the said parties and claimants of the Homestake placer, were never in and upon said ground, unless secretly, except during said interval of time, and have never at any time been in lawful possession of the ground. As trespassers they succeeded in removing large placer values, in excess of $1000.

SECTION 21. The said last mentioned injunction was applied for, issued and served together with that

against Davis, Faubert, et al., in respect to the Salt Lake No. 3, and on the same day, November 11, 1913, said Healey and Scott made an agreement in writing with Defendants in Error Thatcher and Forman, as attorneys at law, to defend them in said injunction proceedings and other litigation that might arise, in return for one-tenth of the net proceeds of the placer gold to be extracted from said ground by them.

SECTION 22. Thereafter and during 1914, Plaintiff in Error having acquired said mining claims, filed application for a U. S. patent for all of said group of unpatented lode mining claims, and certain adverses were filed thereto, as detailed in Section 1 hereof, and out of which this present litigation has developed.

SECTION 23. All the other spurious mining locations in said Copper Canyon group have since said injunction lapsed, and the lode claims affected have gone to U. S. patent. Those affecting the Salt Lake No. 3, Midas and Evening Star alone remain, and these would long since have followed their predecessors, had not a new element or group of contenders appeared upon the scene.

SECTION 24. Defendant in Error Thatcher, in his capacity as attorney, first became interested as stated on a 10 per cent basis for defending the trespassers. But with a growing acquaintance with the property and its riches, there developed a certain partiality for it, and an

appetite for more and greater participation in the anticipated results of the litigation, and for associates better able to share the expenses. The State Comptroller, State Treasurer and State Bank Examiner at the State House in Carson City are able to pay costs and finance the litigation, and they have come in, while the original "clients" or "jumpers" who are penniless, have about all parted with their claims or interests, and passed out of these cases. The names of one or two of the original parties are retained as Plaintiffs along with the more distinguished company, but to what purpose we do not know, as they have no interest or right of action, as shown by their own testimony, deeds, etc.

SECTION 25. But the new Plaintiffs counted without their abstracts. As to the Homestake placer claim, the original plaintiffs had parted with all and every interest or claim they might ever have made or asserted by voluntary deed and by Sheriff's deed on execution or attachment for debt, while the auxiliary or purchasing Plaintiffs have not succeeded to the interests so conveyed away. J. J. Healey, one of the pretended locators of the Homestake, remains in the case, but he had deeded his interest to another before his contract with the attorneys mentioned in Sec. 21 *ante,* and before beginning or joining in this adverse suit. His grantee still holds under that deed and is not a party to this action. Murray Scott, the other locator of the Homestake, lost all inter-

est or claim in the Homestake by Sheriff's sale before the adverse suit, with expiration of time without redemption afterward. None of the Scott interest is now represented in this action. None of the Defendants in Error of record have any right, title, interest or claim in the Homestake, and cannot recover in ejectment herein, or in any other form of action.

SECTION 26. As to the alleged Guy Davis re-location, one of the original locators and claimants remains in case No. 1873 (conflict with the Salt Lake No. 3 lode claim), but he and all those claiming with him are estopped and prevented by their own re-location certificate (which states that it is a *re-location* of the Salt Lake No. 3 ground), from disputing the entire validity of the Salt Lake No. 3 location and the consequent entire invalidity of their re-location of the same ground. Furthermore, he, the Defendant in Error Guy Davis, and others claiming an interest in the re-location, are illegally joined with others having no interest or claim, of record or otherwise, in said Guy Davis re-location, and a judgment in favor of all cannot be maintained, because of the resulting misjoinder.

SECTION 27. There was no lawful mineral discovery in either the Guy Davis location or the Homestake, for the reason that the placer deposits had already been discovered by the owner of the prior lode claims, it was part and parcel of the soil thereof, and the ground was in

the owner's exclusive possession and ownership, and it was not public domain, nor subject to entry and location by another or others.

SECTION 28. They affected to try to prove that there had been no prior mineral discovery in the lode claims by Plaintiff in Error's grantors or predecessors, but all such inquiry and every inquiry going to the performance of any and every of the original acts of location, was and is barred by the Federal statute of limitations, and the lode locations are and were confirmed and made conclusively valid by the efflux of two years and more with the claims in their possession and working, and the Plaintiffs below had no status or standing (for lack of interest or title in themselves) to question the same.

SECTION 29. Furthermore, any such evidence intended as disproof of mineral discovery in the lode claims is unavailing because while our title to the lode locations is perfect under the statute U. S. Rev. St. Sec. 2332 and also under U. S. Rev. St. Sec. 2320, they are also *prima facie* valid and regular by due record and by markings upon the ground. A mining location which is only *prima facie* valid, is absolute as against a junior location to it unless there is some cause or ground of invalidity in fact alleged against it.

SECTION 30. And, while the title to our lode locations is perfect and absolute under U. S. Rev.

St. Sec. 2332 and 2320, respectively, yet if only *prima facie* sufficient and regular under either statute, they are absolute as against a junior location, in the absence of any fact sufficient to invalidate it being alleged against it by claimants under the latter. The jumpers in their complaints alleged nothing against the lode claims, gave no color, but set up an earlier location and discovery by themselves. In their testimony they were compelled to and did recognize the prior existence of the lode locations, and their knowledge thereof when they attempted to make the junior locations. Being without the allegation of any invalidating fact, they are prevented from relying thereon by proof, and from recovering judgment therefor.

SECTION 31. Their testimony in that behalf was insufficient to disprove discovery, because it related not in time, place or circumstances to the original acts of location and mineral discoveries on the lode claims in 1897 and 1907, but to certain recent investigations by the parties themselves at and about the time they were restrained by injunction and at and about the time of their pretended junior locations, which testimony does not constitute *evidence* to disprove mineral discovery.

SECTION 32. Said testimony was also insufficient to disprove prior mineral discovery, because in large part it consisted of opinions without stating the physical conditions upon which the opinions were based; insofar

as they did give the physical conditions, as to crevices, fracture zones, etc., having walls, enclosed material, strike, dip, etc., they corroborated Defendant's witnesses as to the existence of veins and lodes. And they testified that such crevices, fissures, etc., must contain the metals at the surface where they looked, in paying or commercial quantities, in order to rank as veins or lodes within their understanding of the term as miners, etc., thus setting up an illegal standard or test as to the existence of veins, which was without legal quality as evidence.

SECTION 33. They took certain rock samples from two or three cuts or openings on each lode claim, but did not testify that they were taken from a lode or vein, or what appeared to be such, but only *in* or *at* the cut or opening which they had assayed, and the assay sheet showed "0" or "trace" only, except in some instances their assays yielded actual values in gold, silver and copper; while Defendant's witnesses having taken repeated samples from within the fissures in each cut or opening and elsewhere on the ground, secured values at or very near the surface, running as high as $11 or $12 per ton. These samples and assays do not contradict but supplement each other, as the mining decisions hold that true veins are not evenly mineralized throughout, but are barren in places, and are non-uniform in width, length, direction and continuity of values or contact, and often contain

inclusions of the barren country rock within the areas and boundaries of enrichment. So that both barren and productive samples may even be taken from the same fissure filling or vein matter, not to speak of the same openings, shafts or tunnel merely.

SECTION 34. The complaints and also the proofs in both the adverse suits are insufficient to state and prove a cause of action, in failing to allege or establish that the ground included within their attempted junior conflicting locations was at the time thereof (September, 1913) vacant, unoccupied and unappropriated public land of the United States, upon which they might lawfully make a location, or (if previous *prima facie* locations existed on the ground at the time), any fact or facts making the prior locations invalid. And while suing in ejectment and demanding judgment for possession against Defendant, Plaintiffs did not allege that they were out of possession, or that Defendant ever ousted, dispossessed or detained the premises from them. Which makes their complaints insufficient. And while it is true that upon all of *the evidence* the defendant was in *actual possession* of the ground, it was a mere continuation of an ancient possession dating 10 and 20 years ago, long antedating the Plaintiffs' arrival, and was not a wrongful ouster or detention of the ground from Plaintiffs or from anyone else. Their evidence is not only

insufficient but contradicts their complaints and judgments in sundry essential particulars, to be shown herein.

SECTION 35. There were sundry rulings on the admission and rejection of error, refusal of the right of cross-examination, giving and refusing instructions, receiving the verdicts and rendering judgments thereon for insufficiency of the evidence, and because against the law, and other incidental rulings, upon which errors are assigned and will be considered in their order.

If the inquiry occur why we have not obtained relief from these errors upon motions for new trial, we reply that we have never obtained a decision upon the merits of such motion. We duly filed such motions with an extended memorandum or specification of errors and exceptions in each case, soon after the judgment below, and the same were argued andsubmitted before His Honor, Judge Farrington, in August, 1915. They remained under advisement until some time in August, 1916, when His Honor announced that he had found very difficult questions raised thereby, but that he felt he had become disqualified to pass on the motions and would call in another Judge. Thereupon His Honor Judge Deitrich was assigned to the district so as to hear these motions, and the errors were again argued and submitted before him, who took the same under advisement until in December, 1916, and thereupon he disposed of the motions by refusing to decide the legal questions and errors of law

involved, and referred us to this Court for the new trials asked. His Honor felt that he could not with propriety revise the rulings of the trial Judge upon errors of law; that should he do so it would be necessary to retry the case, and the question whether his views are correct or those of the trial Judge, could not be first determined by the Appellate Court. Further, it would be wholly uncertain who would preside over the second trial. And if the disqualification of the trial Judge should continue, there could be no assurance that the Judge granting the new trial would preside, or that the Judge who might be assigned to that duty would entertain his views; and that there is no more reason why, in a second trial, these views should be accepted as the law of the case than that upon the motions for new trial the views of the Judge presiding at the first trial should be so accepted. And that an endless succession of new trials would thus become possible. That in the absence of the most cogent reasons a rule of procedure susceptible of such consequences ought not to be recognized or followed.

His Honor was further of opinion that our remedy for a new trial and correction of errors by application to this Court was open and feasible, and this right was under the circumstances the equivalent of the right on motion in the Court below; and while the expense would be greater, the result will be of a correspondingly higher value.

We do not believe that this basis of decision was correct in law, but we could find no decisions on the subject to warrant a motion for reconsideration, and there were certain arguments of expediency in line with His Honor's reasons for coming up at once, as we had already tarried in the Court below for a year and a half since the trial. Hence we excepted and have brought the case here.

In view of the terms and wording of this decision, which is in the record (No. 2952, pp. 104-105), we feel justified in stating, based upon the colloquy between His Honor Judge Deitrich and counsel for Defendants in Error upon argument of the motions for new trial below, that had he felt authorized to decide the questions submitted he "*would find great difficulty in accepting their view*" upon a number of the questions discussed. We do not aver that this remark is embodied in the record, and claim no such record support, but we do say that the fact that we are here after motions for new trial below denied should not, in view of the decision of Judge Deitrich, which is in the record, raise any grave doubts as to the merits of our assignments of error, as might under some circumstances arise where questions have been repeatedly decided in the same way by different Judges.

As a matter of fact, upon some of the chief features of both cases the law is not doubtful or difficult, but has long been settled by repeated decisions of the United

States Supreme Court and by the courts of all the mining states. Upon other features essential to their success, Plaintiffs below themselves gave evidence which makes their continued success impossible. Upon no point, we assert, are they helped by the rule of decision which makes appellate courts unable in some cases to disturb a verdict or finding of fact in the trial court.

SECTION 35a. The industry of the clerk below enables us to have in the printed records (No. 2952, pp. 46-100, and No. 2953, pp. 47-107) a copy of the memorandum of exceptions and errors used upon our motions for new trials below. These, we understand, have no office to perform in this Court, aside from showing our diligent pursuit of a remedy in the Court below and make for undue prolixity. They would better have been omitted, not being specified in the praecipes for the records, but can be ignored. Our errors assigned anew in this Court, as we are required, appear in the printed records (No. 2952 at pp. 112 to 170; No. 2953 at pp. 113 to 173), attention to which will avoid confusion.

But as the record is long and took several days for trial, we deem it convenient and expedient to take up first for consideration certain questions and assignments which arise at the threshhold of the case, as it were, or which interpose a peremptory bar to the success of Defendants in Error, inasmuch as their solution may render

unnecessary a more extended examination of many other questions arising upon the record and assignments.

SECTION 36. In discussing the assignments of error, we shall present for consideration only the undisputed, uncontradicted testimony and evidence in the case. The solution of the various questions in no manner depends upon the effect of a decision upon disputed or conflicting testimony. Nor is it a question of upholding a verdict or findings where there is some evidence to support it. On the contrary, upon most phases of these cases, the Plaintiffs below themselves gave affirmative testimony hostile to their success, and which prevents their retention of the verdicts and judgments. Upon other points material to their success they either gave no testimony or testimony in harmony with that of Defendant below. Upon the question of their own titles to the conflicting junior locations, they gave the *only evidence*, consisting of deeds, etc., which shows they have no title or interest in the subject matter, and no cause of action against the Defendant as owner of the senior locations.

SECTION 37. In presenting the record, we would have been glad to have included a reduced statement of the testimony ,but opposing counsel did not favor such reduction. And as our challenge is to all the evidence, and as we say there is none to support the verdicts or

judgment, we have been obliged to include it all. We think some of the matter might have been omitted without prejudice, by stipulation. But we have made up for this by including reduced or narrative statements under each head or assignment in our brief, with citations over to the record pages. And if counsel think there is countervailing testimony, they are invited to set it out with their own brief or statement, with record page citations.

SECTION 38. Owing to the matters specified in our motions to combine or remand the records Nos. 2952 and 2953 our assignments of error in this action set out herein at Sections 629 to 694, inclusive, are contained in printed record No. 2953, pages 113 to 173, inclusive, while the assignments of error for said case No. 2953 are printed at pages 112 to 169 of the record in this case No. 2952.

This Court is now in recess or adjournment, and the matter will be covered by appropriate orders when the Court again sits, but as this Brief must meantime be printed and filed, the point is mentioned here to avoid confusion; and again at the headline of each assignment of error herein (Sec. 629-694 *post*) citation is made to the page of printed record where each assignment herein is found.

SECTION 39. With respect to the proceedings upon review an early decision or two holds that the nature of a mining adverse suit is always equitable in view of the

parties and issues. But the majority of cases, including those decided by the U. S. Supreme Court (Sections 215-226 *infra*) are to the contrary, and that the action is at law if Plaintiff be out of possession seeking to recover it; and in equity if in possession against a Defendant making a wrongful adverse claim. The question is no doubt set at rest since Perego vs. Dodge, 163 U. S., 160. But through a maximum of precaution we have sued out both appeals and writs of error to this court.

SECTION 39a. *Propositions Presented for Decision.* The ultimate propositions for decision presented by this record in brief, are as follows:

(a) The Plaintiffs below, Defendants in Error, have no title, right of possession, or right of action for the ground in dispute or within the area of the junior locations as claimed by them.

(b) Defendant (Plaintiff in Error) has a perfect title to the ground under his prior lode location by possession and working under U. S. Rev. St., Sec. 2332, which is a limitation statute. All questions going to the initiation of his locations are barred thereby.

(c) Defendant (Plaintiff in Error) also has perfect title to the ground by location under the regular mining statutes and U. S. Rev. St. 2320 for lode locations.

(d) As the greater includes the less, Defendant has a *prima facie* title and right of possession under both "b" and "c," *supra*. A *prima facie* location will be up-

held until something sufficient to invalidate is alleged and proved against it.

(e) But a location under "b" is irrebutable and conclusive, as a title by limitations always is, as to any act necessary to initiate the claim. And a *prima facie* location under "c," plus actual possession and improvements under it, also bars entry by another to initiate a junior claim.

(f) In case a mining location under the regular mining statutes be *prima facie* only, and the possession under it be constructive only and not actual, it may be defeated by entry and junior location by another in good faith, peaceably and without force or fraud, and by allegation and proof of the act, default, omission or noncompliance with the law which constitutes the cause or ground of invalidity of the first location.

(g) In the case supposed in paragraph "f," there must be both allegation and proof by the junior locator of the acts or omission constituting invalidity of the first location. In absence thereof the law presumes the prior *prima facie* location to be valid, and will not inquire as to supposed defects not alleged against it by the junior locator.

(h) Defendant's prior lode locations are valid as in paragraph "e," *supra*, and are not subject to attack by Plaintiffs or by junior locators because:

1. Defendant's and his grantors' possession under their locations was actual, not constructive merely as in paragraph "f"; any encroachment thereon was unauthorized by law, and conferred no rights on the trespassers.

2. No ground of invalidity in fact, by act or omission was alleged against the senior lode locations in the complaints therein. Under said complaints the most that might be asked, is to compare dates of the locations and award the ground to the elder locator and his grantees.

3. All inquiry into the validity or sufficiency of the acts of location of the prior lode claims is now barred by limitations as in paragraph "b."

4. The Plaintiffs below, or those under whom they seek to make claim, elected to *re-locate* the ground within the Salt Lake No. 3 by a form of notice which estops and prohibits them from questioning the sufficiency and legal validity of the Salt Lake No. 3.

5. Plaintiffs have no standing or right of action to question the lode locations for lack of interest in the subject matter of the junior location (paragraph "a").

(i) There is a fatal misjoinder of parties plaintiff in this action, which precludes their success herein.

(j) The complaint is insufficient to state a cause of action herein because it does not allege:

1. That the ground was at the time of their junior location or re-locations, vacant, unoccupied and unappropriated mineral land of the United States. It is only on such ground the law authorizes a mineral location.

2. That there was a failure to discover a lode or vein of mineral-bearing rock in place within the

Senior lode claims prior to the date of the attempted junior location.

3. Or that there was any other act or omission or non-compliance with law to invalidate the prior lode locations, and make the ground open to entry and location at the time attempted by Plaintiffs.

4. That there has occurred any ouster or detention, unlawful or otherwise, of the Plaintiffs by the Defendant. And this is an action at law for possession. But, the complaints allege that Plaintiffs are *in possession.*

(k) The Plaintiffs also did not prove either of the propositions in paragraph "j," *supra,* but did affirmatively prove the contrary by their own testimony.

(l) The legal presumptions of regularity and validity which attend a *prima facie* mining location, regular and valid on its face, were not met and overcome by Plaintiffs either by allegation or proof.

(m) These presumptions and the resulting burden of the issue and proof were acknowledged and undertaken (without an issue) by Plaintiffs at the trial, by offering opinions (without the physical facts on which the opinions were based), to the effect that there were no lodes or veins at or about the certain portions of the surface. But they testified they would not consider anything to be a lode which did not contain values at the surface evenly distributed in excess of the law's requirements.

(n) They testified to the existence of the physical characteristics and indicacia of veins and lodes at many

points within the lode locations, viz.: walls of country rock and included material having width, strike, dip, and mineralization in the precious metals as shown by some of their own samples and assays.

(o) Other samples and assays which their witnesses testified to have taken for the purpose of disproving values, lodes and veins, were withheld from evidence by them and Defendant was forbiddn to interrogate about such assays on cross-examination, although presumptively unfavorable to Plaintiffs in their own chosen field of inquiry as to non-mineralization of their samples.

(p) Their samples of rock from which their assays actually put in evidence to prove non-mineralization, were taken, were not testified by them to have been taken from within the veins or between the walls thereof (except in one or two instances), but only that they were taken "at" or "in" a certain open cut, shaft, or tunnel in which there were both mineralized and unmineralized surfaces exposed and from which both barren and productive samples can be taken at the option of the taker.

(q) This Court will be asked to hold and decide (so far as that matter may be treated as relevant or within the issues submitted for decision) that non-mineralization or barrenness of one or more rock samples taken from a given cut, shaft or opening in a mining cliam, no matter whether taken from without or within the walls of a vein, is not evidence to disprove the exist-

ence and genuineness of the vein, because true fissure veins are never evenly mineralized throughout their width, strike or dip, but increase, decrease and pinch out entirely in mineralization as well as contact from point to point therein, even those veins wherein the greatest values are found and from which the most profitable shipments are made.

(r) That the primary inquiry as to existence of a vein relates to the existence of walls with included material of different character and carrying appreciable values in the metals at some point or points therein, and which a miner can follow reasonably expecting to find ore valuable enough to work.

(s) That the rock samples taken by Plaintiffs at and near the surface of the ground, some showing values in gold, silver and copper, and some showing none, are consistent with each other and consistent with the samples taken by Defendant's witnesses, also showing such values. And that the varying values are the ordinary earmarks of a true vein or lode so far as values are concerned.

(t) The Court below ruled to exclude Defendant's testimony generally and also by samples and assays, unless Defendant could prove that the point on the vein testified about, and the point where a given sample was taken, were points exposed and known to the locators or owners prior to September, 1913. This was error and

against the decisions of the Courts, which say that veins and lodes do not grow up and become mineral-bearing in a year or two, and that proof of their existence now is elemental in proving their former discovery.

(u) The Court below reversed the rule of law as to the burden of proof (paragraphs "g," "l" and "m," *supra*) and held that the burden of proof was on Defendant to prove former discovery of a lode or vein by the lode locators and not upon Plaintiffs to disprove such discovery, which burden the Plaintiffs had confessed and sought to discharge.

Thereby depriving Defendant of the presumptions of law, the recitals of mineral discovery in the recorded lode location notices and certificates and the subsequent proved existence of genuine lodes and veins in cuts, shafts and tunnels made on the ground since the original location of the said lode claims; and also of his rights as a purchaser upon the record.

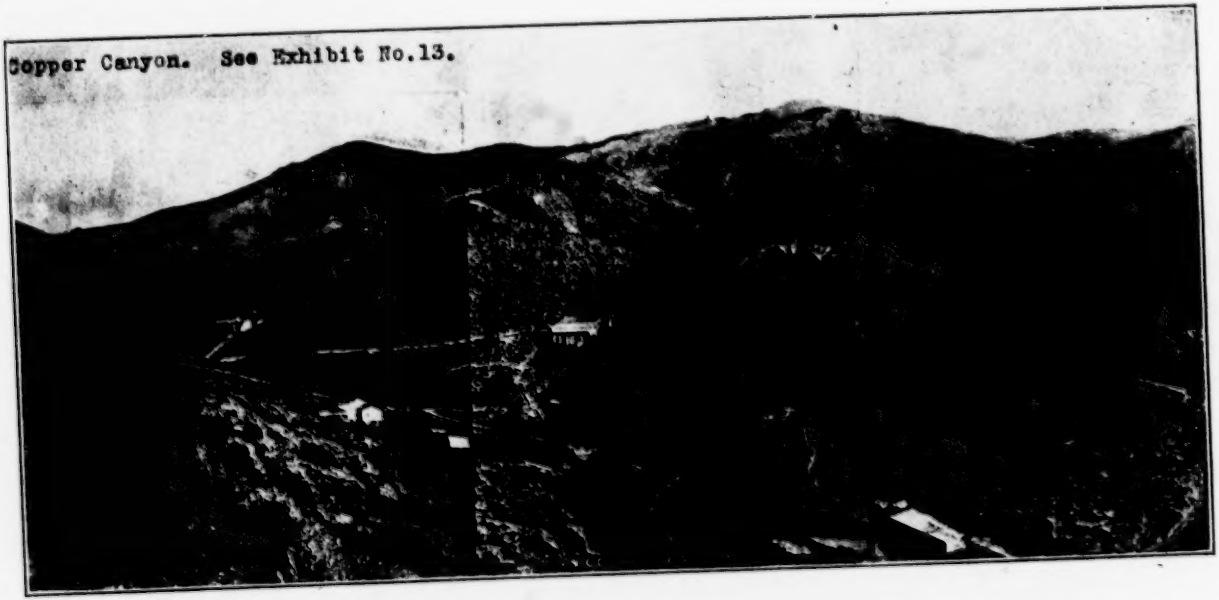
(v) The Court erroneously deprived Defendant of his rights and title to the ground by adverse possession and working under U. S. Rev. St., Sec. 2332, and refused to recognize or instruct the jury concerning the same.

(w) The jury returned verdicts which are defective and insufficient in form and substance and against the law, and the Court rendered judgment thereon. Neither the verdicts or judgments give the information now required by the U. S. Rev. St., Sec. 2325-2326, as

amended, and they show no right of possession or legal compliance by Plaintiffs to entitle them to possession or patents for the ground.

(x) Numerous other errors to be shown, any one of which will forbid the Plaintiff's retention of the verdicts and judgments.

Copper Canyon. See Exhibit No.13.



STATEMENT OF THE CASE—INDEX.

Adverse possession 13
Annual labor 4, 6
Application for patents 22
Assignment of error 36
Attorney's fee contracts 18, 21
Boundary monuments 12
Complaints insufficient 34
Copper Canyon 10, 39
Conflicting locations 16, 17, 18, 23
Custodian 14
Discovery, none in the placers 27
" as to lodes, inquiry barred 28
" no issue as to 29, 30
" not disproved 32
" assays 33
Evidence, rulings as to 35
Fissuring 9
Improvements 5
Injunctions 17-21
Location of the lode claims 2, 3
Map of ground 8
Misjoinder of Plaintiffs 26
Nature of action 39
Operation of properties 4, 6

Parties to actions.....38
Placer shafts 15
Placer discoveries 15
Propositions presented for decision.....39a
Relative position of claims..... 8
Re-location of the Salt Lake No. 3.....17, 26
Status of litigation..... 1
Substituted Plaintiffs 24, 25
Title to the junior conflicting locations, want
of in Plaintiffs 25, 26
Topography 7, 8
Transcript of record.....37
Wash 10, 11

CHAPTER II.

NO TITLE OR RIGHT OF ACTION IN PLAINTIFFS TO THE GUY DAVIS RE-LOCATION.

Section.

(A) The Issue as to Title.....40
(B) Assignment of Error.....41-53
(C) Plaintiffs' Chain of Title, Deeds.....42
(D) Status of Their Title, if Any.....43
(E) Revenue Stamps 45
(F) The Attorney's Fee Agreement.....46
(G) Misjoinder of Parties Plaintiff.....52
Nevada Statutes 56
(H) Contentions by Defendants in Error.....61
(I) Re-location of the Salt Lake No. 3 as the:
Davis claim 68
Citations 70
Contentions 86
(J) Amended Re-location Notice.....90
(K) Relief 112

(A) THE ISSUE AS TO TITLE.

SECTION 40. The complaint alleges that Plaintiffs were or are the owners of the Guy Davis mining claim by full compliance, etc., and by actual prior possession, location and discovery, etc. Sets out the things complained of, and prays for restoration of possession and decree of ownership, damages, etc. Record, pages 15-16. (See Sec. 234, *post.*)

The answer denies such ownership and right of possession of the ground complained about. Record, pages 20-21.

At the trial Plaintiffs put in their evidence of title by location and chain of conveyances, which shows they have no title or right of action whatever as respects the alleged Guy Davis location. But the verdict and judgment were rendered against us. We assign as error:

(B) ASSIGNMENTS OF ERROR.

SECTION 41. **Assignment No. 41 (See 673, post.)**

11. The evidence shows positively, affirmatively, and without conflict or dispute, that the said Guy Davis and Noah Faubert undertook to *relocate* the ground contained in said Salt Lake No. 3 lode mining claim, under the name of the DAVIS

LODE CLAIM, thereafter called Guy Davis lode claim, and Guy Davis placer, and that in their notice of location, they specified that the same was a *relocation of the Salt Lake No. 3, claimed by The Glasgow Western Mining Company on the grounds of failure to comply with the requirements of law.* And that they are thereby estopped to deny the lode mineral character of the ground, or the legal validity of the said Salt Lake No. 3 lode mining claim.

12. The evidence does not show any joint or common estate, title, or right in all the Plaintiffs, nor any joint or common right of action in all of the Plaintiffs, in relation to the alleged Guy Davis lode or placer claim.

13. The evidence does not show any right, title or estate in any of the Plaintiffs, to the said Guy Davis location.

14. The evidence does not show that all of the Plaintiffs are or were represented in any adverse filed in any Land Office, or in support whereof, this action was begun or prosecuted. Some of the Plaintiffs were not so represented.

15. Said evidence shows that some or all the Plaintiffs have no interest whatever in the alleged GUY DAVIS location.

(C) PLAINTIFFS' DEEDS AND EVIDENCE OF TITLE TO THE GUY DAVIS RE-LOCATION.

SECTION 42. The Plaintiffs proffered the following as their muniment of title to the ground under the alleged Guy Davis re-location.

Entry No.	Nature of Instrument	Date of Instrument	Date of Record, if any	Grantors	Grantees	Extent of Interest Conveyed	Exhibit No.	Page of Record
(1)	Location Notice	1913 Sept. 5	No Record	United States	Guy Davis Noah Faubert	All	B	236
(2)	Location Notice	1913 Sept. 6	No Record	United States	Guy Davis Noah Faubert	All	C	237
(3)	Location Certificate	1913 Sept. 6	1913 Oct. 20	United States	Guy Davis Noah Faubert	All	D	268
(4)	Q. C. Deed	1914 June 24	1914 July 22	Noah Faubert D. S. Van Orman	Geo. B. Thatcher	½ of their interest	W	482
(5)	Adverse Notice	1914 Sept. 24	1914 Sept. 24	Geo. B. Thatcher Guy Davis Noah Faubert	Themselves	All	L	443
(6)	Q. C. Deed	1915 Mar. 20	No Record	Noah Faubert	Geo. A. Cole Ed. Malley Gilbert Ross	All his interest	A-2	498
(7)	Q. C. Deed	1915 May 24	No Record	Geo. B. Thatcher	J. J. Healey	1|10 int.	A-5	501-2 535
(8)	Agreement	1913 Nov. 11	No Record	Noah Faubert	Geo. B. Thatcher Wm. Forman	1|10 net of gold extracted.	T	473

(D) STATUS OF THEIR CLAIM OF TITLE.

SECTION 43. Guy Davis and Noah Faubert, being locators, acquired each an undivided one-half interest in whatever rights, title or interest was acquired by anyone in the alleged Davis lode claim, or Guy Davis placer as it was subsequently denominated. As we will presently see, no one at all acquired any interest thereunder, or any right to the possession of the ground thereby, owing to the recitals in their location notice. But we will first follow down their chain of conveyances.

SECTION 44. On July 22, 1914, there was recorded a quitclaim deed from Noah Faubert and D. S. Van Orman to Geo. B. Thatcher, for one-half of all their interest in the alleged Guy Davis claim. Van Orman had no interest in the claim, so far as appears, and his joinder in the deed neither increased nor decreased what the grantee Thatcher would have received from Faubert without him. He merely witnessed the signatures of the locators on the location notices. Result on July 22, 1914: Guy Davis, ½; Noah Faubert, ¼; Geo. B. Thatcher, ¼, by deed from Faubert. These three filed the adverse on Sept. 24, 1914, in the Land Office.

SECTION 45. *Revenue Stamps.* This finishes up

the recorded conveyances. There are two or three unrecorded instruments.

By quitclaim deed (Entry No. 6 in our list, Sec. 42) Geo. B. Thatcher undertook to convey to J. J. Healey, a one-tenth interest. This deed was dated May 24, 1915, never recorded, and had no revenue stamps attached as required by the Act effective Dec. 1, 1914. Each of these deeds were objected to when presented and offered in evidence, for want of any revenue stamps. Counsel for Plaintiffs was allowed over our objections and exceptions to go out and get some stamps and attach to the last mentioned deed (Exhibit A-5), and then put the deed in evidence, but he had as well not, because he put on only ten cents in stamps, *an insufficient amount.* The admission of these two deeds, and each of them, was error. The error is considered separately at Sec. 523, *post,* of this Brief. The deeds were legally impotent to convey or pass any interest, and it is as if they had not been made or put in the record. Only Faubert, Davis and Thatcher are interested.

Sackett vs McCaffery 13 Fed 219

This finishes the unrecorded conveyances.

SECTION 46. *The attorney's agreement.* This is the agreement spoken of in Sec. 18, *ante,* by which the attorneys were to be paid 10 per cent of the net proceeds of the gold to be extracted after paying the expenses of extraction, handling and sale, in return for standing by and defending them in the legal proceedings, injunc-

tions and contempt proceedings which were thickening around. The full text of the agreement appears at Record, page 473.

SECTION 47. Counsel say this was *a conveyance* of a one-tenth interest in the mining claim itself, and point to the last clause. In this we believe they are incorrect. The last sentence attempts to characterize or put a legal construction on the whole body of the instrument, but there are no apt words of conveyance in the agreement, no operative words having the legal effect or result of a conveyance. It is a mere hiring, and their compensation is to be measured by a one-tenth part of the amount of money that shall in future be realized and returns from the *ore or placer gold that may hereafter be extracted from the ground.*

SECTION 48. These words are not words of conveyance but of hiring, the same as a farm laborer or foreman agreeing to work and be paid an amount equal to one-tenth the net proceeds of a crop of wheat or hay after paying the operating expense of producing the crop. Such an agreement furnishes a method for determining the amount of compensation, but is not a conveyance of the farm itself nor of a one-tenth interest in the farm. And we do not believe it is competent, or that the effect of such an agreement is controlled, by a clause that the arrangement is a conveyance of a one-tenth interest in the real estate itself.

Where an agreement is uncertain, in its terms, it may be competent for the parties themselves to put a construction on it. Where there is no uncertainty, it is not competent to provide that the agreement is something other than that which the operative words chosen by the parties express it to be.

SECTION 49. A conveyance of an article is one thing; a hiring to work upon, improve or protect the article is another. The first transfers title; the second retains it. One takes effect now and the transaction closes. The other is executory, and a failure to perform by second party may defer or destroy entirely his right to compensation. The two are inconsistent, and the transaction must be one or the other, and cannot be both. Under a hiring, if some gold is extracted and marketed today, and some more tomorrow and next week, as each amount is sold, but the title itself remains in the hirer. When all the gold has been extracted and sold, the compensation of the party hired ceases and he has nothing in the land itself which he can convey. The attorney's fee is paid, but the legal fee or title remains in its owner.

SECTION 50. In any event the agreement has never been recorded as appears, and if either the deeds, Exhibits A-2 or A-5 (entries Nos. 4 and 6 in our list, Sec. 42), are to have any effect at all, they supersede the agreement, being recorded first.

SECTION 51. If the deed, Exhibit A-2, is rejected for want of revenue stamps, the Defendant in Error, J. J. Healey, has no interest in the Guy Davis location, and no right of action.

If the deed, Exhibit A-5, is rejected for want of the required amount of stamps, or any stamps legally attached, the Defendants in Error, Cole, Malley and Rose, have no interest or right of action.

If the agreement of Nov. 11, 1913, never recorded, *supra,* is not a conveyance but a mere contract of hiring as we assert, Defendant in Error William Forman, has no interest or right of action. If it be treated as a deed of conveyance, as our opponents contend, still Forman has never joined or participated in any adverse in the U. S. Land Office, which is a condition precedent to any right of action on his part by way of adverse to the Salt Lake No. 3 patent application under U. S. Rev. St., Secs. 2325-2326.

Gwillim vs. Donnellan, 115 U. S. 46; 29 L. Ed. 348.

People vs. District Court, 19 Colo. 343; 35 Pac. 731.

Hamilton vs. Min. Co., 33 Fed. 562-5.

Wolfley vs. Lebanon Min. Co., 4 Colo. 112.

Lavagnino vs. Uhlig, 71 Pac. 1046, 198 U. S. 443.

Lancaster vs. Coale (Colo. App.), 150 Pac. 827.

In an action under U. S. Rev. St., Sec. 2326, to determine the right of possession of a mining claim, those only who have filed their claims in the U. S. Land Office can intervene or be made parties.

Mining Co. vs. Debour, 61 Calif. 364.

The notice of application for a mineral patent is, in effect, a summons to all adverse claimants, with return day in 60 days, to file an adverse.

Wolfley vs. Lebanon Co., 4 Colo. 112.

People vs. Dist. Court, 19 Colo. 347.

SECTION 52. *Misjoinder of parties.* So that in any event, less than all of the Plaintiffs are interested, or have an adversing interest or right of action in the alleged Guy Davis location, William Forman joined in this action as a Plaintiff below without authority of law, when it was begun. Neither Cole, Malley, Ross nor Healey were in this action when it was begun, but were brought in when the trial opened on May 26, 1915, upon motion of Plaintiffs' attorneys to substitute them, which was done subject to objection should their deeds, when put in evidence not justify the change. Result, misjoinder. And,

An amendment by which a party is first brought into the suit after the 30-day period for filing suit upon an adverse has expired, is too late.

Lindley on Mines, Sec. 755, note 40, page 1849.

Citing Holman vs. Cent. Mont. Co., 34 L. D. 568.

SECTION 53. This defect of title and right of action in some of the Plaintiffs below, arising upon their own proofs, was also raised by our motion for a nonsuit at the trial, as follows:

Assignment No. 28.

Defendant moves the Court for an order of nonsuit on the following grounds: * * *

> 2. Because sufficient facts have not been proved by the Plaintiffs herein to entitle them to a verdict or judgment in their favor or any affirmative relief. And because Plaintiffs' proof shows that they are entitled to no verdict, judgment or relief herein; and because sufficient facts have not been proved to entitle the Plaintiffs to go to the jury. (Sec. 655, *post.*)

Assignment No. 61.

and by

> The general and special verdicts, and each thereof are contrary to and against the law, in each and every one of the particulars wherein it has been above specified, under Assignment No. 41 that the evidence is insufficient to support, sustain or justify the verdicts. (Sec. 692, *post.*)

and

Assignment No. 60.

> The judgment is against the law, because the evidence herein is insufficient to support, sustain or justify the same, in each of the particulars herein specified under Assignment No. 41. Sec. 693, *post.*)

Said verdicts and judgment were each duly excepted to for such insufficiency at the time. See Record, p. 1243-1244.

We refer to without repeating Secs. 43 to 51 this Brief, in support of these assignments as quoted.

SECTION 54. This action was begun and tried as an action at law, in nature of ejectment or for possession. Under the following, one or more Plaintiffs having an interest in real estate, cannot join with persons who have no interest whatever, and obtain a joint or common judgment or any relief. The action can only be dismissed.

Pomeroy's Rem & Rem Rights at Sec. 213 shows that at common law and also under the Codes, in actions strictly legal in their nature, where any one or more of the Plaintiffs, less than all, establish their common interest in the property, in respect of which the suit was brought, the whole case must be dismissed.

In such legal actions, a failure to show a jointness in all the Plaintiffs is a complete failure of proof.

Pom. Rem & Rem Rights, Sec. 255, citing:

Bartges vs. O'Neill, 13 Ohio St. 72.

Masters vs. Freeman, 17 Ohio St. 328.

De Bolt vs. Carter, 31 Ind. 355.

Goodnight vs. Goar, 30 Ind. 418.

Lippord vs. Edwards, 39 Ind. 165.

Esterbrook vs. Messersmith, 18 Wis. 572.

Franz vs. Young, 24 Iowa 375.

Girard vs. Beach, 3 E. D. Smith 337.

SECTION 55. The ancient rule in equity cases probably was that in case of misjoinder of Plaintiffs, the Court might dismiss as to the non-interested Plaintiffs, and give judgment in favor of those shown to have an interest. But this rule has been superseded in Nevada, it appears, and does not now obtain in equity cases in the Federal Courts.

This action was begun in a State Court of Nevada, and as an action at law or legal in nature, is governed as to joinder of parties by the State Statute.

U. S. Rev. St., Sec. 914.

2 Foster's Fed. Prac., Sec. 453, p. 1425.

SECTION 56. The Nevada Statute is:

4998. *Persons interested may be joined as Plaintiffs.*

Sec. 56. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as Plaintiffs, except when otherwise provided in this Act.

5000. *Persons claiming under common title.*

Sec. 58. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners or in severalty, may unite in an action against any person claim-

ing an adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

Rev. Laws, 1912.

In McBeth vs. Van Sickle, 6 Nev. 470, there was joined in the action at law two persons, only one of whom had the right of action. Neither could have judgment therein.

> *Per Curiam:* "The practice Act declares that all persons having an interest in the subject of the action, may be joined as Plaintiffs, except when otherwise provided in this Act. The converse of this provision, that none can unite who have not such interest is undoubtedly the law. * * * The judgment must be set aside."

6 Nev. 470-1.

SECTION 57. In Perry vs. Ins. Co., 11 Fed. 478, the Federal Court decided that it should follow the State Statute of Rhode Island requiring that in cases of misjoinder the Court should not dismiss except as to the non-interested Plaintiff, and give judgment for the remaining Plaintiff, and it is very clear from the opinion that the Court would have dismissed as to all, the case being at law, but for the State Statute. There is no such statute in Nevada, but the contrary holds at least at law, as shown above. The Federal Courts do not follow the state practice in equity (U. S. Rev. St., Sec. 912), but the U. S. Supreme Court equity rules, and we need not inquire as to the Nevada practice in equity.

SECTION 58. Rule 26 in equity (edition Rules 1912) of the Supreme Court, is substantially the same as the Nevada statute quoted *supra*. It reads:

> "When there is more than one Plaintiff, the causes of action joined must be joint." * * *
>
> Rules 1912, Rule 26.
>
> 1 Foster's Fed. Pr., Sec. 140.
>
> "Under this rule no persons can unite in a bill in equity unless they have a joint or common interest in obtaining the same relief."
>
> 1 Foster's Fed. Pr., Sec. 140, p. 492, citing:
>
> Walker vs. Powers, 104 U. S. 245; 26 L. ed. 729-31.
>
> Doggett vs. R. R. Co., 99 U. S. 72; 25 L. ed. 301.

Therefore, either at law or in equity, this action would have to be dismissed as to the Plaintiffs, while Defendant retains his right to proceed under the amendment to U. S. Rev. St. 2325-2326, and cases elsewhere cited herein.

SECTION 59. The rule itself is ancient, and the foundation of it is in the principle that no man shall sue another in the courts unless he is injured, either singly, if he sues alone, or jointly, with other Plaintiffs, with whom he joins. He cannot join with others not injured or affected by the supposed cause of action, and have judgment. There is really no hardship, for the Plaintiffs should know the particulars of their title when

they sue or join in a suit, and if they join with those who have no interest or title or injury, it is their folly. The very nature of ejectment is *ex delictu,* and the Plaintiffs should know if they are harmed and who harmed them at the very least, when they go into Court. They cannot consistently plead ignorance of the very facts which are the ground-work or gravamen of their suit, and which are relied on to furnish them a remedy. There is no excuse for misjoinder in real actions, if reference be made to the public records.

The U. S. Supreme Court recognized this rule in Oliver vs. Alexander, 6 Pet. 143, 8 L. ed. 349, although it was not a fundamental point of decision in that case; but the Court referred to the rule by saying that "joint interest is essential to the proper joinder of Plaintiffs in actions at law."

SECTION 60. This point was also saved by objection to the variance between complaint and proof under Assignment No. 41, paragraph 16, Sec. 673, *post*; and by motion for non-suit, Assignment No. 28, paragraph 3, Sec. 655, *post,* and by our exceptions to the verdict and judgment, Assignments Nos. 60 and 61 (Sec. 692-693, *post*).

And by request for jury instruction, Assignment No. 50 (Sec. 682, *post*). It ought not to be necessary to instruct the jury to the law arising upon the pleadings, but if the case had to be submitted to the jury they should be

instructed as to the law, so as not to return a verdict that the Court cannot lawfully base a judgment upon.

We asked a peremptory instruction for Defendant, but this was refused. Assignment No. 42, Sec. 674, *post.*)

SECTION 61. *Contentions by Defendants in Error.* It is objected by Defendants in Error that we never demurred to the complaint for misjoinder of Plaintiffs, and they cite the Nevada Statute requiring it. But the objection did not appear upon the face of their complaint and so there was no ground of demurrer.

They say we could have asked to amend our answer at the trial, to set it up. But an answer setting up affirmative matter is only required in order to give notice of testimony and proofs which the Defendants may intend to offer at the trial, barring Plaintiffs' right, so that they may be warned and enabled to come prepared to deny or disprove such affirmative facts, or new matter. In this case, it is the Plaintiffs themselves who produced the new matter, the damaging evidence—and they cannot plead surprise or injustice at their own evidence and deeds.

SECTION 62. Not only so, but it is a defect of proof by them under the general issue. They allege title in all the Plaintiffs. We deny such title. Their proofs show a variance, in that only a part of the Plaintiffs, if any, have any title or right of action, and that their

allegation of general and common ownership in all the Plaintiffs is untrue.

SECTION 63. They say that an action can be prosecuted by one tenant in common only without joining the co-owners. This is no answer. One tenant in common or joint tenant is seized *per mi et per tout,* and may recover the whole against a stranger or trespasser. But it does not follow that while he may omit to join his co-tenant, he may take on strangers to sue with him, who have no interest in the controversy, cause of action, or property. This is shown by the fact that while two or more co-tenants may either one or both sue to protect the common property, yet if they sever and have partition, neither can thereafter sue or join in respect of that part of the property which has become the individual interest of his former partner or co-partner or co-tenant. There is no longer that entirety of interest that is good as against a stranger. And if not, then neither can a stranger join with either of them, either before or after partition.

SECTION 64. They say also misjoinder is subject for plea in abatement. The same reply follows, that a plea is only necessary to give notice of a defense. Where no pleading is due, no such objection arises. Where Plaintiff himself produces the injurious facts, lays them on the altar of justice, and asks the Court to judge there-

from where the right lies—then no pleading is due from his opponent, and he cannot complain if those facts require the judgment to go against him. He cannot say, as he might if his adversary proved those facts without notice, that if he had been warned he might have disproved those facts by witnesses or deeds of his own. When he has sworn to the facts, and caused his witnesses to swear to them, he cannot say that they are untrue and might have been disproved. He cannot complain that judgment must go against him upon his own showing. He might as well get up in Court and say he was mistaken, has no title or cause of action, and then demand the judgment, anyhow, because his opponent had not alleged and proved his absence of right. On the contrary, before one can have judgment against his neighbor, he must both allege and prove his own right to it.

SECTION 65. They cited *Nesbit vs. Delmar,* 24 Nev. 273-285, 52 Pac. 609; rehearing 53 Pac. 178. This was an equity case under the Nevada Code, to quiet title by one in possession, and has no application. As an action at law, this case is not controlled by the State Statute and decisions in *equity cases,* but the State Statute and practice in matters of law only, where not inconsistent with the Federal Statutes. (Sec. 55-57 and 259, *post.*) In equity matters the U. S. Equity Rules control. In the Federal Courts it seems misjoinder of Plaintiffs is fatal. Sec. 57-58, *ante.*

SECTION 66. They cite *Ronnow vs. Delmue,* 23 Nev. 33; 41 Pac. 1074, but that case opposes their contention. It was a blended law and equity case under the Nevada Code, involving a demand for unliquidated damages and for injunction in equity. The damage claim was dismissed at the trial, and it proceeded in equity for the injunction. The Court held that as a matter of fact on the proofs there was no misjoinder, and the Plaintiffs' interest in the ditch and water was in common, and a joint action to restrain was proper, even if they could not recover a joint judgment for the damages.

SECTION 67. They cited *Brown vs. Warren,* 16 Nev. 241, and *Erhardt vs. Boaro,* 113 U. S. 528, where one co-tenant or owner in common could protect the common estate against a stranger; but this does not cover the case of an unauthorized stranger suing jointly with a tenant in common, with no common estate to protect in all the Plaintiffs.

SECTION 68. *Re-location of the Guy Davis claim.* Independent of misjoinder of Plaintiffs, there is an absolute bar to the success of any of them, arising from the form of their re-location notice, Exhibit "B," (Record, p. 236, which reads:

> "Location notice, Sept. 5, 1913, 10 A. M.
>
> "This is to certify that I, the undersigned citizen of the U. S., have on this day of September, the fifth (5), 1913, *re-located* what is called *the Salt Lake No.* 3 on the grounds of failure to comply with

the requirements of the law, said Salt Lake claim being claimed by The Glasgow Western Mining Company.

"This claim shall be known as the Davis lode claim, situated in Lander County, Nevada, Copper Canyon Mining District, in Township 31, Range 43 E., M. D. B. and M. B., 18 or 20 miles southwest of Battle Mountain, and runs as follows: 200 feet southerly from the location monument and 1300 feet northerly; 300 feet on each side of the location monument.

"GUY DAVIS,
"NOAH FAUBERT, Locator.

"Witness: D. S. Van Orman."

SECTION 69. *Effect of rectitals.* They *re-located* the Salt Lake No. 3 for failure of the owner to comply with the law. Aside from all questions of pleading and proof to which we will later refer, this recital precludes them from disputing the legal validity of the Salt Lake No. 3 mining claim. Under this re-location notice, their only possible resort would be to show failure to do the annual labor and consequent forfeiture after its initiation, but they cannot dispute its original existence and validity of the location. But they admitted in Court there had been no forfeiture (Record, p. 686), and the Court took that subject away from the jury. (Record, p. 1224-5). So there was no other ground of attack, and the Court erred in sustaining the verdict upon the evidence by rendering judgment.

SECTION 70. Authorities and citations.

"By the re-location of a claim, the existence of a prior valid location is admitted."

27 Cyc. 602.

Wills vs. Blain, 20 Pac. 798.

Shattuck vs. Costello, 68 Pac. 529.

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735.

Mining Co. vs. Burke, 57 Pac. 641.

Quigley vs. Gillett, 35 Pac. 1040.

Lindley on Mines (2nd Ed.), Sec. 404.

Jupiter Min. Co. vs. Brodie Min. Co., 11 Fed. 666.

Armstrong vs. Lower, 6 Colo. 393-5.

Re-location implies the validity of the original claim.

Providence G. M. Co. vs. Burke, 57 Pac. 641.

Wills vs. Blain, 5 N. M. 238, 20 Pac. 798.

A re-locator by re-locating, admits as valid the prior location which became forfeited by re-location.

Golden vs. Murphy, 103 Pac. 394-8 (Nev.).

And there can be no re-location in this sense unless there has been a prior valid location, or something equivalent, of the same property."

Belk vs. Meagher, 104 U. S. 279-89, 26 L. Ed. 735.

Patchen vs. Keeley, 19 Nev. 404, 14 Pac. 347.

SECTION 71.

"The filing of a re-location notice reciting that it is a re-location of a previous location, the prior location showing the date thereof, is an admission by the party filling it that his location is premature, where filed prior to the expiration of the previous location."

Shattuck vs. Costello, 68 Pac. 529.

"A recital in a location certificate that it is a re-location of a former mining claim forfeited for non-compliance with the law, is *a binding recital of record of the prior location, and the re-locator is held to a recognition of the validity of the former claim.*"

Wills vs. Blain, 20 Pac. 798.

SECTION 72. The location notice of the Guy Davis claim states upon its face that it is but a re-location of the Salt Lake No. 3 claim on account of the failure of the owner to comply with the law, the same as in *Zerres vs. Vanina*, 134 Fed. 614. In that case the Court held:

"A re-locator is not a discovery of a lode, but an appropriator thereof, and cannot hold the ground except upon making proof that the original locator has abandoned the ground, or forfeited his right by failure to comply with the mining laws."

To the same effect: Belk vs. Meagher, 104 U. S. 279, 26 L. Ed. 735.

SECTION 73. "All the authorities agree that a re-location impliedly admits that there has been a valid prior location because there can be no re-location unless there has been a valid prior location, or something equi-

valent thereto. There can be no re-location until there has been an abandonment or forfeiture by the first locator."

Zerres vs. Vanina, 134 Fed. 610-14, citing:

Belk vs. Meagher, 104 U. S. 279-89; 26 L. Ed. 735.

Lindley on Mines, Sec. 404.

Snyder on Mines, Secs. 573 and 580.

Baringer and Adams on Mines, Sec. 306.

Wills vs. Blain, 4 N. M. 378, 20 Pac. 798-802.

Providence Min. Co. vs. Burke, 57 Pac. 1040.

Quigley vs. Gillett, 35 Pac. 1040.

SECTION 74. Where a location notice for a mining claim contains this recital:

> "This is a re-location on the ground formerly located by unknown parties and abandoned in 1895 or 1896, name of former owner unknown."

These words stand in the nature of an admission by such locator that his location is premature, being made before the expiration of the prior location referred to.

Shattuck vs. Costello, 68 Pac. 529-532.

SECTION 75. In the case of *Zerres vs. Vanina* (150 Fed. 564), the facts were:

> The Plaintiffs in Error brought ejectment to recover possession of a certain mining claim. The claim had been located as the "Eddie claim," on February 9th, 1902, by the grantors of Defendant in Error. On that date, notice of the location of the claim was posted on the claim of the locator, and

on March 20th, 1902, it was recorded in the office of the District Recorder of Searchlight Mining District, Nevada, wherein the claim is situate. The ground was marked with monuments and staked.

Soon after the location was made, a shaft was sunk on the ground, disclosing mineral at a depth of about 14 feet. Sufficient anuual labor was expended upon the claim. The Plaintiffs in Error claimed title under a re-location made on January 1st, 1904. It was the contention of the Plaintiffs in Error that the prior location was void by reason of defects in the notice, and the failure to record the certificate of location within 90 days after posting the notice of location.

Findings and judgment went for Defendant.

Held upon review:

"One may make an original location of a mining claim upon land marked and occupied under an attempted prior location; if such prior location is void by reason of failure to comply with the law as to location notice or recording the same, but he cannot make a *re-location* of such a claim. Such land, if mineral, is, notwithstanding the prior proceedings, unappropriated public land subject to location. *Re-location* is authorized only for forfeiture or abandonment of a prior location. By *making re-location the locator makes admission of the validity of the prior location, and precludes himself from contesting it.*"

Zerres vs. Vanina, 150 Fed. 564-5, citing:

Belk vs. Meagher, 104 U. S. 284; 26 L. Ed. 735.

Wills vs. Blain, 4 N. M. 378; 20 Pac. 798.

Prov. G. M. Co. vs. Burke, 57 Pac. 641.

Lindley on Mines (2d Ed.), Sec. 404.

Quigley vs. Gillett (Cal.), 35 Pac. 1040.

SECTION 76.

The validity of a prior location being admitted, the burden is on the re-locator to show that Defendant failed to do his assessment work.

Quigley vs. Gillett (Cal.), 35 Pac. 1040.

Min. Co. vs. Hammer, 130 U. S. 292; 32 L. Ed. 964.

SECTION 77. In the case of Wills vs. Blain (N. M.), 20 Pac. 798, the facts were:

"The principal question for determination is the legal effect of the Defendants' location notice as above. The trial Court instructed the jury that the Defendants' location certificate offered in evidence does not appear to be and is not an original location of a mining claim, but is a re-location of the claim known as the Dreadnaught, the right to the possession of which the *Plaintiffs' claim, and as they set up title only as re-locators of the original lode claim,* they impliedly admit the validity of the prior location. There can be no re-location unless there has been a prior valid location or something equivalent, of the same property."

The Defendants excepted to this instruction, and the Court held (in review upon the strength of *Belk vs. Meagher* (104 U. S. 284), that the instruction as given was correct. The Court held that the words used by the Supreme Court of the United States in *Belk vs. Meagher,* upon the subject of re-location, were not mere chance expressions, but were used to express the deliberate decision and opinion of th Court upon facts expressly presented and calling for a decision thereon. Thus the Court, in quoting from *Belk vs. Meagher,* says:

"It is quite apparent the United States Supreme Court intended to pass upon the legal effect of the recitals in Belk's notice, and did not by mere inadvertence, use mere chance words, conveying the idea of a rule to which the Court did not intend to commit itself. It would seem the Court intended to distinguish between a locator and a re-locator, classing the former as the original discoverer of mineral before unknown, and the latter as the mere appropriator of mineral discovered by another, and forfeited by reason of his failure to perform the anuual work of $100.000 required by law."

Wills vs. Blain, 20 Pac. 798, 801-2.

SECTION 78.

"The locator, when he so describes himself, solemnly *admits in an instrument* which is made a *matter of record,* that he is *not the discoverer of mineral,* but an appropriator thereof, on the ground that the original discoverer had perfected his right. The notice becomes in some sense an instrument of title—a record. It is the equivalent of an admismission of record to the original locator, that the re-locator claims a forfeiture by reason of the failure on the part of the first locator to make his annual expenditure. This, we believe, to be the doctrine of *Belk vs. Meagher, Supra,* and on that authority sustain the instruction of the Court below on that point."

Wills vs. Blain, 20 Pac. 798-802.

SECTION 79.

"A re-locator of a claim is not a discoverer thereof, but he is a mere appropriator thereof."

Zerres vs. Vanina, 134 Fed. 610.

"When one makes a location of a claim, the rights of the prior locators must have expired by abandonment, forfeiture, or other cause."

Wills vs. Blain, 20 Pac. 798.

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735.

Lockhart vs. Rollins, 21 Pac. 413.

Jordan vs. Duke, 53 Pac. 197.

Min. Co. vs. Burke, 57 Pac. 641.

Niles vs. Kernan, 62 Pac. 360.

Shattuck vs. Costello, 68 Pac. 529.

Conn. vs. Oberto, 76 Pac. 369.

Renshaw vs. Switzer, 13 Pac. 127.

Omar vs. Soper, 18 Pac. 443.

SECTION 80.

Defendant purchased a mining claim Dec. 26, 1890, and shortly thereafter abandoned it because unable to do the assessment work. The Defendant's son re-located the claim Jan. 30, 1891, as an abandoned lode, giving the date of discovery as Dec. 20, 1890, and then conveyed to the Defendant, who claimed solely under tht re-location, until after the Plaintiff had located an interfering lode.

HELD: That the re-location was void, and the Defendant could not recall his abandonment and claim the re-location was to protect his rights under the original claim.

Niles vs. Kernan, 62 Pac. 360.

SECTION 81.

For the purpose of re-location of a mining claim, the land must be subject to location, and there can be no *re-location* where the claim is in *actual possession of persons,* who *have done* the requisite amount of assessment work under an insufficient location.

Ware vs. White, 108 S. W. 832.

SECTION 82. *Cunningham vs. Pirrung,* 80 Pac. 329, well defines the difference between an ordinary location and a *re-location* of mining ground. A re-location can only be made where there has been a valid former *location.* The Arizona statute required a party taking up ground, to state in his *notice* whether it was one or the other, and if based upon a loss, forfeiture or abandonment by a former locator, must state that it is a re-location. There is no similar statute as to the *notice* in Nevada, but the definition of what is a *re-location* holds good. And if the papers recite that it is a *re-location,* the party is held to the admission of validity of the first location, and precludes him from questioning it in support of his own re-location. And if he desires to question it, he must make an original location, and not a re-location.

Per Curiam: "Where the subsequent locator bases his right upon the contention that the prior locator never made a valid location under the law, then he is not re-locating an abandoned claim, but is making an original location where the prior attempted location was ineffectual. In such case it is not only improper for the new locator to state in

his notice that he locates the same as abandoned property, or re-locates the claim, but such statement if made will preclude him from contesting the question to be determined, namely, the validity of the prior location."

Id., 80 Pac. 329-330, citing:

Providence Min. Co. vs. Burke, 57 Pac. 641.

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735.

Wills vs. Blain (N. M.), 20 Pac. 798.

Lindley on Mines, 216-219, 404, 643, 755.

Barringer and Adams on Mines, c. 11.

Copper Globe Min. Co. vs. Allman (Ut.), 64 Pac. 1019.

Becker vs. Pugh, 9 Colo. 589; 13 Pac. 906.

McCraig vs. Bryan, 10 Colo. 309; 15 Pac. 413.

Hopkins vs. Noyes (Mont.), 2 Pac. 280.

SECTION 83. In the case of *Zeres vs. Vanina,* 150 Fed. 564, which has heretofore been quoted, the prejudicial recital in the notice was:

"This claim was originally known as the Eddie."

This recital was held, under the doctrine of the cases above cited to be an admission of record of the validity of the proceedings and steps taken to locate the early claim. Therefore, as the admission or record is not impaired by the fact that the Defendant, in error, on the trial, introduced in evidence the documentary proofs of the Eddie loca-

tion, *such proofs were unnecessary* and are to be disregarded. The Plaintiffs in Error could only recover, if at all, upon the strength of their own title. They had elected to acquire title by re-locating the claim, and they were obliged to abide by the record they had made.

This is the doctrine in *Belk vs. Meagher*, 104 U. S. 279 (quoting the words): *"Judgment below is affirmed."*

Zeres vs. Vanina, 150 Fed. 564.

SECTION 84. In the case of *Golden vs. Murphy* (Nev.), 103 Pac. 397-8, the location notice was headed:

"Notice of Re-location."

and, in the body thereof, the following statement appears:

"This is a re-location of the *Richmond G. & S. M. claim* and shall be known as the *Canyon G. & S. M. claim*, the said Richmond G. & S. M. claim not having had the necessary amount of labor or improvements made or expended thereon, as required by the laws of the United States."

The Richmond G. & S. M. claim is shown to have been located prior to the junior re-locating claim.

HELD: "The Plaintiff and his grantor asserted rights to the Canyon claim as a re-location of the Richmond G. & S. M. claim. As re-locators they recognized the validity of the prior location."

Golden vs. Murphy, *supra.*

SECTION 85. In view of their admission that there was no forfeiture and the withdrawal of that element

from the case, and their estoppel to question the validity and due location of the prior Salt Lake No. 3, of which they attempted *re-location,* I do not see what occasion there is for their presence in Court under the *re-location,* regardless of their own want of title or possession, or community of interest therein.

SECTION 86. *Opposing contentions.* In arguments below we heard a number of theories advanced to meet this situation, but there was no consistency or continuity of contention, and we do not know if we can anticipate their position in this Court.

They said that *Zeres vs. Vanina,* 150 Fed. 564, which we cited, is inapplicable, because in that case the re-location notice not only called it a re-location, but adopted the former discovery, and contended for defects in the record. This is incorrect, for the estoppel arose from the recital that it was a *re-location,* whereas there can be no re-location until there has been a valid *location.* So say all the cases we cited. This and this alone determines the question. *Re-location* precludes question either as to discovery, notice, certificate, marking of boundaries, or any other supposed defect. The rule is not partial or sidewise in its application, nor limited to particular supposed defects only, but is absolute and universal, and precludes all and every inquiry as to any defect or invalidity whatever in the prior location, which is admittedly valid by

the fact of re-location. What the re-locator thus admits of record, he is estopped and precluded ever to deny.

SECTION 87. The recital in their re-location notice is:

> "have re-located what is called the Salt Lake No. 3 on the grounds of failure to comply with the law, etc."

Compare with the recitals held binding in the following cases:

> "This claim was originally known as the Eddie."
>
> Zeres vs. Vanina, 150 Fed. 564.
>
> "This is a re-location of the Richmond G. S. & M. Co. claim."
>
> Golden vs. Murphy, 103 Pac. 397-8.
>
> "re-location of the Dreadnaught claim for non-compliance with the law."
>
> Wills vs. Blain, 20 Pac. 798.
>
> "This is a re-location of the ground formerly located and abandoned in 1895 or 1896, name of owner unknown."
>
> Shattuck vs. Costello, 68 Pac. 529-532.

To the same effect all the other cases we have cited; and see also:

Jackson vs. Prior Hill Min. Co., 104 N. W. 207.

Zeiger vs. Dowdey, 13 Ariz. 331-4; 114 Pac. 565.

In the Zeiger case there was no adverse possession, nor any of the other bars to the inquiry as to previous invalidity occurring and discussed herein, but the road was theoretically open to them, except as to that one feature, viz.: the recital of a re-location by Plaintiff, and it was held in view of such recital he would not be permitted to offer any evidence to attack or question the validity of the prior location.

SECTION 88. They have contended that in *Zeres vs. Vanina,* the Plaintiff was held not a discoverer of mineral, but an appropriator thereof, hence not deserving. Doubtless, that comment was made in the Zeres case as showing he was getting his deserts by the operation of the rule. But the decision turned not on that element, but on the fact of *recited re-location.* And so do all the other cases cited. But even so, the Plaintiffs in this case are no more deserving than in the Zeres case, for neither they nor the re-locators *discovered* any placer mineral in the first place, nor did they even come on the ground until they had heard of the wonderously rich placer strike which the owner of the lode claims had found in the ground, and saw the placer working already opened by him to bed rock, exposing the placer gold deposits. (See Chapter V, Sec. 213, *et seq., post.*)

SECTION 89. They said that they re-located this ground, claiming it to be placer, whereas in the Zeres case it was re-located as a lode claim. And that re-loca-

tion as placer is a denial of its lode character. Neither the one nor the other is true in law. It is the fact of *re-location* which precludes dispute, not the character of it as lode or placer. Ground may have both lode and placer deposits sufficient to sustain either form of location or re-location, and the placer locator may either apply and pay extra for the lode, or omit it and take the placer alone, as he pleases. (U. S. Rev. St., Sec. 2329, 2333.) Neither form of deposit is inconsistent with the existence of the other, but placer is eroded material from lodes and veins.

SECTION 90. *Amended re-location notice.* But they say they made an amended re-location notice, which is sufficient in itself. Their Exhibit "C" (Record, p. 237), recites that they do

> "hereby make an amended location of the Guy Davis lode claim, located Sept. 5, 1913, and located same as a placer, etc., 1500x600 feet."

This continues the admission of the original notice that it was re-located as a *lode claim,* not a placer claim. But it is not competent to amend a lode claim into a placer claim, for the two are essentially distinct, and rest upon a difference in character of the mineral deposit discovered and located upon, not upon a mere difference in name of the claim.

SECTION 91. *Nature of amendment.* But an amendment cannot set up for itself, independent of the

valid original, which it was sought to amend, and be a location by itself. In its capacity or function of an amendment, it may have a modifying influence upon the paper or notice to be amended, but it cannot ignore entirely the parent notice which alone gives it life and the power to exist. Cases cited presently, but first make our position clear.

SECTION 92. *Federal statutes.* U. S. Rev. St., Sec. 2320, authorizes lode locations on a lode or vein. U. S. Rev. St., Sec. 2329, authorizes placer locations on placer deposits. Without such statutes neither form of location could be made, for the government is the owner. Under neither statute can a lode location be made on a placer deposit, or a placer location upon a lode or vein. No one will say this could be done indirectly by amending a location from one lode in form to one placer in form, by a modification of recitals, or vice versa. It would necessitate a modification or change of the physical structure of the deposit from mineralized rock in place to mineralized loose dirt and gravel. If the ground chances to contain both forms of deposit (which Plaintiffs here deny), it is still not an amendment, but a locator may abandon his lode location on the lode or vein, and locate the ground again based upon the placer deposits, or vice versa. And if both exists the locator may elect whether he will locate a lode location on the lode or vein, or a placer location on the placer deposits.

SECTION 93. *Nevada Statutes.* Not only the character of mineral deposit is different but the record requirements. This is chiefly regulated by the state statutes.

> *Lode locations.* Nev. Rev. Laws, Sec. 2422, authorizes *one who discovers a lode or vein* to locate * * * by posting a notice at the time and place of discovery containing:
>
> 1. Name of lode or claim.
>
> 2. Name of locators.
>
> 3. Date of location.
>
> 4. Number of lineal feet in length along the course of the vein each way from the discovery point, with the width on each side of the center of the vein, and the general course or trend of the vein as near as may be.

Either will give him possession of the ground, but having discovered and located a lode he cannot by amendment make it a placer claim, for the latter requires both discovery and location upon placer deposits, including certain differences in the form of location notice and certificate adapted to each. In other words, you cannot amend a mule into a cow, nor a house into a ship that will sail the seas, by any change or amendment of the recitals in the title papers. The two things are wholly distinct, and if you want a cow or a ship you must go about getting one in the usual way, not by attempted

amendment of something you have into the desired article.

Placer locations. Nev. St., Sec. 2434, provides for posting a placer location notice which shall contain:

1. Name of claim.

2. Name of locators.

3. Date of location.

4. Number of feet or acres claimed.

5. Marking boundaries, unless it conform to public surveys.

SECTION 94. When we examine both their original and amending re-location notices (Record, pp. 236 and 237), we have no difficulty in seeing that the lode notice is what they filed, under Section 2422, Clauses Nos. 1 and 4 are distinctive in that statute, and relate to a lode claim, and are inapplicable to a placer claim. While under the placer notice, Sec. 2334, *supra,* Clauses 1, 4 and 5 are distinctive in their application to a placer claim, and neither of these were observed in their re-location notice, but Clause No. 1, as to the name, only was sought to be changed by the amending notice.

SECTION 95. *Discovery point.* Besides specifying it as a lode claim by name and description of length and breadth (1500x600 feet, which is in excess of the 20 acres permitted to a placer location), they also specified therein that their discovery point was 300 feet from

each side line, 200 feet from south end line, 1300 feet from north end line. (Record, p. 236-7.) This point is shown by the shaft No. 8 on the map (Sec. 8, *ante*), made from their Exhibit "A," which is not on the placer deposits in the canyon at all, but up on the hillside where there is no depth of soil except such as can accumulate on a sloping mountain side, and no perceptible placer gold can collect. This shaft they described as 4x6x10 feet in size. (Record, p. 229.) And they called it the Davis lode claim.

Now, it is not possible to change a lode location like that over into a placer location *by amendment.*

SECTION 96. *Re-location notice.* Nev. St., Sec. 2428, provides:

> "That the *re-location* of *an abandoned lode claim* shall be by sinking *a new discovery shaft* and fixing new boundaries as if it were the location of a new claim.
>
> Or, the re-locator may sink the original discovery shaft 10 feet deeper than it was at the time of the abandonment, * * * and erect new or *adopt the old boundaries,* renewing the posts or monuments if removed or destroyed. In either case a new location stake shall be erected.
>
> In any case * * * the record may state that the whole or any part of the new location is *located as abandoned property.*"

As shown, they elected to comply with this statute by:

1. Making a new discovery shaft.
2. Adopting the old boundaries.
3. New stake.
4. Stating re-location of the ground as abandoned or forfeited property, *i. e.*, by failure to comply with the requirements of the law.

SECTION 97. The distinctions between a lode and a placer location are generic, and so are the form of notices prescribed for each. They are not merely branches of one thing, but they are distinct things. And one cannot be amended into the other. Neither can a re-location notice be so changed by amendment. For certain consequences flow. Where a re-locator avails himself of this statute, Sec. 2428, and recites that he located it as abandoned ground, he cannot deprive others of the benefit of his record admission to that effect. There is no statute permitting it.

SECTION 98. *Estoppel.* If a locator should contend that his location is different from that which his notice indicates, it would logically be to contend in favor of the invalidity of his notice at least, and under some conditions, his location itself. And contrawise his use of a given form of notice when recorded, is documentary ~~debowing~~ evidence against him that his location was not intended to be and is not any different kind of a location than that which his notice declares it to be. The cases we have cited in this chapter shows that there is an

estoppel to deny what is thereby admitted. And that the use of a *re-location notice* admits, and estops him to deny, that there has been a prior location, because you cannot *re-locate* or locate over again what has not been previously located in the first place. You cannot repeat an act which has not already occurred.

This is not an accidental or ill-considered rule, but a deliberate ruling establishing a fundamental principle, deliberately established upon facts calling for it, by the Supreme Court of the United States in *Belk vs. Meagher,* and this the Court held in *Wills vs. Blain,* 20 Pac. 798, which it is instructive to read.

SECTION 99. Now, if it is true that a re-location notice is a binding recital and admission of a prior valid location, from which the re-locator cannot withdraw or retreat, is it not also binding as to all the other recitals, including the statement as made here that it is located as the *Davis lode claim,* and also the description in lineal feet and direction of the vein, under Sec. 2422, Nev. St., which is inapplicable to a placer location?

SECTION 100. *Function of amendments.* The function of an amendment under Nev. St., Sec. 2427, is to:

1. Correct an erroneous or defective location certificate.

2. Supply some requirement of law not previously complied with.

3. Change surface boundaries.

4. Take in part of an overlapping claim since abandoned.

5. To obtain benefits of the act, if located before. Provided it does not interfere with existing rights of others.

And no re-location or record thereof shall preclude the claimant from proving any titles held under previous location.

None of these were accomplished by the amendment attempted by their Exhibit "C." (Record, p. 237.) Let us see if it did.

SECTION 101. Their Exhibit "B," original re-location notice, contains no legal error, defect or non-compliance with law to be corrected, for that matter, but is a valid lode location notice complying with the Nevada St., Sec. 2422, (Sec. 93, *ante*), in that it contains:

1. Name of lode or claim (Davis lode claim).

2. Name of locators (Guy Davis and Noah Faubert).

3. Date of location (Sept. 5, 1913).

4. Number of lineal feet in length along the vein each way from the discovery point, and the width on each side, viz.: (200 feet southerly and 1300 feet northerly, and 300 feet on each side).

And it complies with Nev. St. 2328 as to being a re-location, as shown in Sec. 96, *ante*. So there was no error,

defect or illegality to be corrected. Unless it be such error as one commits when he buys a mule and finds later a cow would suit him better. But this is not such an error as the statute contemplates. But what change or correction was attempted by their amending re-location notice?

SECTION 102. Their Exhibit "C" amending notice recites:

> 1. We, the undersigned, hereby make an amended location of the Guy Davis lode claim.
>
> 2. Located Sept. 5, 1913; and locate same as a placer claim.
>
> 3. Running 1300 feet north of location monument and 200 feet southerly, and 300 feet on each side of monument.
>
> 4. Work consists of a 10-foot hole, 15 or 20 feet south of the location monument.
>
> 5. This claim shall be known as the Guy Davis placer claim.

This notice continues the recital of the original location as a lode claim, contained in the first notice. Not shown there is any error or defect in the original name, or legal non-compliance.

The date and size of the claim is the same as before, and there is therefore no error, defect or non-compliance with law in these respects, so far as a lode claim is con-

cerned. But it is illegal in size for a placer location, and continues so in the amending notice.

The discovery work is all right for a lode claim, and no error or defect shown or correction attempted.

SECTION 103. And there was neither an attempt to (3) change boundaries; (4) to take in overlapping ground after abandonment thereof; nor (5) obtain any benefits of the act not already possessed; for it was only,

The only change sought to be accomplished was the re-located the day previous in the first place.
change of name from *Davis lode claim* to the "*Guy Davis placer claim.*" But changing the name of a thing does not change its character. It did not change the place and facts as to lode mineral discovery upon which the re-location was initiated, boundaries established, and name given to it. It did not diminish the area to the lawful limits of a placer claim. In fact, their original notice, Exhibit "B," not repudiated but amended by their notice, Exhibit "C," admits the existence of veins and lodes, and valid discovery thereon under the Salt Lake No. 3, by the very fact of the re-location. (Secs. 68-84, *ante*).

SECTION 104. But granting, for argument, that there was ground or legal reason for filing an amending notice at all. The law in regard to amendments is well settled. An amendment is something designed to perfect an original. It is an ancillary process for the elimina-

tion of errors and defects, and cannot be used to initiate rights as an original. No one ever heard, for instance, of a party going into Court and filing an amended complaint, or an amended answer, or an amended anything else, as his first paper in the case. Until there is something to amend the question of an amendment is one of utter irrelevance.

It is just like the re-location question we were speaking of. Until there is a location, there cannot be a re-location, and this is true in law as well as logic, for the U. S. Supreme Court has sealed the rule with its approval, as shown.

SECTION 105. Not only so, but the amendment must take to itself the character and type of the paper to be amended. It must be germane, or it is no amendment. A legislator who would move as an amendment to a civil appropriation bill, or bill for internal improvements, or a bill to replenish the pork barrel, for instance, —an amendment for a declaration of war, or for use of the military forces, or for an improvement in the mail service—would get a committee appointed to watch him. And an attorney who would offer to file as an amendment to a civil complaint, an amended criminal indictment against the same Defendant, for instance, would be ordered out of Court. Perhaps we may state less rigorous examples of the same rule, but it is one of universal application, and we need not take the time of the Court

to propose further illustrations. It applies in all its force to mining locations and amended mining locations.

SECTION 106. We find the following principles of amendment laid down in *Lindley on Mines,* 3d Ed., with abundant citations to each proposition.

> "The second or amended notice is not an abandonment of the original."
>
> Lindley, Sec. 398, p. 931, note 62, citing cases in Nevada, Colorado, Wyoming, California and Idaho and Federal Court.

This first is in answer to Plaintiffs who wish now to abandon their first notice, and claim only under their second one, now that they are in trouble over the first.

> "The evident intent of the statute (viz.: permitting amendments) is that the additional certificate shall operate to cure defects in the original, and thereby to put the locator, *where no other rights have intervened,* in the same position he would have occupied *if no such defect had occurred.*" Such intent is in accord with all curative provisions of the law."
>
> Lindley, pp. 927-928, note 50, citing:
>
> "When the original certificate of location may be deemed defective, an additional one may be filed to cure its defects, and *both may be put in evidence.*"
>
> Lindley, p. 928, note 53, citing:

No suggestion here of abandoning the original, and putting in the amendment only in evidence. Nor was that done at the trial hereof.

SECTION 107. Where an original location is void, however, it cannot be amended at all. "If the original is void it cannot be given validity from the date of the amendment."

27 Cyc., p. 575, note 7, citing:

Sullivan vs. Sharp (Colo.), 80 Pac. 1054.
Gurney vs. Brown, 32 Colo. 472; 77 Pac. 357.
Field vs. Tanner, 32 Colo. 278; 75 Pac. 916.
Moyle vs. Bullene, 44 Pac. 69.

We could cite other cases, but the above are sufficient on this point.

SECTION 108. And their Guy Davis re-location notice, Exhibit "B," *is void* in either alternative. If the ground is wholly lode, they do not contend they can make a placer location by amendment, we suppose. If it is placer in character, then their first notice is void, and there is nothing to amend under the cases cited, by their Exhibit "C." They might then disregard entirely the void notice, but they cannot retain and amend it. And if they attempt to do so, as they have, they retain the binding admission of the validity and legal existence of the prior Salt Lake No. 3 lode location, with all its legal essentials as to regularity, discovery, posting, and other ingredients of a valid mining claim. And the Exhibit "C" notice which agrees with Exhibit "B" in all but the attempted change of name of the claim, continues the same admissions of prior validity of the lode

claim, and consequent invalidity of the junior Davis claim.

SECTION 109. *Attorney's lien.* But counsel claimed in argument that if all this is true, still they have an attorney's lien under the contract, Exhibit "T," (Sec. 42, *ante*), which though unrecorded, will override all subsequent conveyances, under Nev. Rev. Laws, Sec. 5376, which reads:

> "The *compensation* of an attorney and counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, or the service of an answer containing a counter-claim, the attorney who appears for a party, *has a lien upon his client's cause of action or counter-claim*, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof into whosoever's hands they may come, and *cannot be affected by any settlement* between the parties before or after judgment."

SECTION 110. But this statute says the compensation is governed by the agreement or contract, as it must be. The contract, Exhibit "T" (Record, page 473), is to pay the attorneys one-tenth the output of gold which the client may take out of this ground of Plaintiff in Error, called by them the Guy Davis claim. They had a closing three-line clause, saying the agreement should be understood as a conveyance of a one-tenth non-assessable interest. They have been contending against reason that these contracts are deeds. But if so, they are

no better than any other deeds, and are cut out by the subsequent recorded conveyances, if the latter are valid, as they insist (Sec. 42), like any other deed would be. And such a deed, if delivered and accepted by the attorneys, would be a satisfaction of and extinguish the lien. If I have a lien on property and accept a deed, I am paid. Anyhow, my lien and title getting together, they are merged.

And, anyhow, the liens only inure to the attorneys and cannot inure to the other Plaintiffs below, Defendants in Error, and there is disunion and misjoinder.

SECTION 111. And if the contracts are not deeds, then the attorneys are not owners nor grantees thereunder, but lienors with recourse to equity to enforce their liens. And that is all the statute gives them. Proof of a lien will not sustain an allegation of title. A lien may be paid off, and discharged like any other security, but an interest is present and actual, and can only be conveyed. is not title.

A lien when foreclosed may transfer title but itself

And their lien, if any, is not actual but contingent only. Until there is a final judgment and litigation ceases, there will be nothing for the lien to attach to. For the statute give it only upon the verdict, decision or judgment in their client's favor, and upon the proceeds in whosoever's hands, etc. When they have obtained a final judgment, and prove they have "clients" on whose interests their lien for services attach, and if we under-

take to purchase from their clients, it will be time enough to assert a lien for their services, as against us.

SECTION 112. They contended that we did not object to their re-location notice going in evidence. The record showed we objected to all their evidence of location until they first showed the ground was vacant and unappropriated public land. Our objections were overruled. But if they must put in evidence of re-location, we should not object perhaps to such evidence as only hurts themselves and benefits us, by precluding them from disputing our title.

Relief. Because they have no paper title in all the Plaintiffs to the alleged Guy Davis re-location,—resulting in misjoinder of parties plaintiff; and because they have no title or right of action in any of the Plaintiffs to said re-location, resulting from their estoppel by re-location to dispute the legal validity of the prior Salt Lake No. 3 lode mining claim and the consequent invalidity of their *re-located* mining claim; the judgment below should be reversed and the adverse claim of the Plaintiffs rejected and dismissed; and with the rights of the Defendant to the ground to be determined upon other portions of this record.

As to legal effect of no title or right of action in plaintiffs see pp. 241-243 post.

9
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CHAPTER III.

ADVERSE POSSESSION.

Section

(A) Title of Plaintiff in Error to the Lode Claim Under U. S. Rev. St., Sec. 2332, in General 113

(B) The Evidence, Condensed Statement..... 114

(C) Assignment of Error..... 123

(D) Federal and State Statutes..... 124-5
Decisions Under the Statute..... 126

(E) Title and Rights Under the Statute Equivalent of a Valid Mining Location, Under U. S. Rev. St. 2320..... 131

(F) Creades Presumption That Location Was Lawfully Made..... 135

(G) Title Under Sec. 2332 Good Without Location Under Sec. 2320..... 136

(H) Precludes Inquiry as to Prior Mineral Discovery, 141; Rights of Purchaser on the Record..... 152

(I) Lavagnino vs. Uhlig, and Similar Cases 156

(J) Contentions of Defendants in Error..... 157

(K) Additional Assignments of Error..... 164

(L) Relief Asked 170
(M) Abstract of All Evidence as to Possession and Working by Plaintiff in Error and His Grantors 171

(A) TITLE OF PLAINTIFF IN ERROR TO THE LODE CLAIMS BY POSSESSION AND WORKING UNDER U. S. REV. ST., SEC. 2332.

SECTION 113. *The issue as to title.* This is another subject we have advanced for consideration out of its chronological order upon the record, on account of its importance and controlling effect upon all other subsequent questions.

In answer to the complaint alleging title and possession, and right of possession, to the ground under the alleged Guy Davis location, as in *Section* 40 hereof, we pleaded in the answer our prior rights to the ground acquired under and by compliance with the provisions of the U. S. Rev. St., Sec. 2332. It was alleged in our answer, among other things, that on or about Feb. 2, 1897, the grantors of Defendant (below) entered upon the unappropriated public domain and located the Salt Lake No. 3 lode mining claim, marking the boundaries as required by law, and from thence until Sept. 5, 1913 (date of pretended Guy Davis re-location), were in the

quiet and undisputed possession of said mining claim, and during all of said time were in the open, notorious, adverse and undisputed possession of said mining claim, holding and working and living upon said mining claim. And on said date, while said claim was so held, owned, occupied, and possessed by Defendant's grantors, and with full knowledge thereof, Plaintiffs and their grantors wrongfully and without authority entered upon said ground without the knowledge or consent of Defendant and his grantors and attempted to locate said Guy Davis claim upon the ground contained within said Salt Lake No. 3 lode mining claim. That by reason thereof Defendant below was the owner, and Plantiffs trespassers and their attempted junior location void and of no effect. (Record, pp. 24-25.)

By their reply, they denied these paragraphs of our second affirmative defense. (Record, pp. 30-31.)

(B) THE EVIDENCE, CONDENSED STATMENT.

SECTION 114. *Evidence of possession and working, etc.* In view of the following items and articles of proof, which cover all the essentials of title, possession and working under the provisions of U. S. Rev. St., Sec. 2332, it is questionable whether we need consume the time of the Court to read the full account and history

of the dealings of Plaintiff in Error and his grantors with this property, the developments, group workings, individual workings, buildings, mill, road, etc., etc., and constant presence of the owners or their agents on the ground maintenance of boundaries, etc., since the claims were originally located to the present time. Very much more was done in this way than the law requires in order to manifest possession and acquire title. But lest the writer be supposed himself to shun the labor required, the full account will appear on some pages under Sec. 171-173 at the end of this chapter.

SECTION 115. The following, as we said, appears to have all the essentials of title under this chapter.

John Foley testified:

Rec. Page

560 That he went to the ground of the Salt Lake No. 3, on Feb. 2, 1897, found a lode in place, and put up a monument, in company with his brother, et al. Large outcrop of mineral bearing matter.

563 It was ledge matter, different from the country rock. Built monument, about 4 feet high, 2 feet through, rock and timber.

564 My brother put location notice in it, which I filled

566 out. Located for J. H. Clive. Notice put in evidence. Have seen the southwest corner monument hundreds

568 of time since, by the road.

Rec. Page

569 Recorded notice location put in evidence; made by witness, showing record on Feb. 5, 1897, and reciting vein, lode or ledge, etc., in compliance with statute. J. H. CLIVE, locator.

570

SECTION 116. *Joseph* ~~Jurey~~ Jorgy testified:

601-3 (Testifed same as above as to discovery, monument, etc.): Built discovery monument, giving size, etc. Built boundary monuments on all corners and side centers, size and material, marking them according to directions. I paced off and filled in the distance in the notice, put notice in a can and can in discovery monument. Did that for J. H. Clive. Since the location of that Salt Lake No. 3 have seen the corners quite often. When last seen they were in about the same position as when located the claim.

603 604 606 608

610 Have been by there often since then, always people living there in the houses on Salt Lake No. 3.

SECTION 117. *Joseph Jurey* testified:

653-4 I have lived in Copper Canyon in these houses on Salt Lake No. 3 continuously ever since 1898, except during 1914. Know where the boundary monuments on Salt Lake No. 3 are; never been any change in their location; last saw them about a month ago; same position then as in 1898. I have to go around them once in a while to see they are up and in place.

645 and 653 During all this time have been employed and acting as foreman and caretaker for The Glasgow & Western Exploration Co., owner of the property.

SECTION 118.

1094 Exhibit No. 39, deed from J. H. Clive to Glasgow & Western Exploration Co. for Salt Lake No. 3 and other mining claims.

1102 Exhibit No. 41, deed from Glasgow & Western to Joseph Ralph for Salt Lake No. 3, and other mining claims.

655-688 Testimony to performance of all annual labor on all claims.

792, 1167 and 1181. Affidavits of labor all years, all the claims.

686 The Court: I do not suppose there will be any question on the part of the Plaintiffs that the amount of work done on these claims exceeded $100 for each claim?

Mr. Thatcher: Oh, no.

SECTION 119.

977-8 Plaintiffs' counsel admitted that at the time of the location of the Guy Davis claim, there were four monuments up and in place, one at each corner of the Salt Lake No. 3; at the time they located that is the condition they found them, with possible exception of an inch or two one way or the other.

1093 Plaintiffs' counsel say they will admit the conveyance of the claims from the beginning down to Mr. Ralph.

1225-6 The Court instructed the jury that there had been no attack on the lode claims for failure to perform the annual work, and they cannot find them invalid for such failure or for any forfeiture from failure to do such work.

(For additional testimony as to possession, see Sec. 171, et seq., post.)

SECTION 120. The foregoing is redundant in some respects under the citations presently to be made, for under those cases it is not necessary to prove the original acts of location and discovery at all, but only possession and working for the required time of two years or more. Of that, anon.

SECTION 121. *The Guy Davis location* was only attempted to be made over 16 years after the Salt Lake No. 3, to-wit, on Sept. 5, 1913. (Record, p. 236.)

SECTION 122. *Verdict and judgment.* Notwithstanding the foregoing in *Secs.* 115-121, which is undisputed and not in conflict, the jury returned a verdict for Plaintiffs, on which the Court entered judgment, and we excepted for insufficiency of the evidence, and because the verdicts and judgments are against the law.

(C) ASSIGNMENTS OF ERROR.

Assignment of Error No. 41. (Sec. 673, post.)

SECTION 123. The Defendant assigns the following grounds of insufficiency of the evidence to support or sustain the judgment and verdicts herein. * *

22. The evidence shows positively, affirmatively, and without dispute, that the Defendant and his grantors had been in open, notorious, exclusive, adverse possession of said ground, under the Salt Lake No. 3 lode mining claim, for more than two years prior to the time of the alleged re-location of the ground by or under the Guy Davis re-location; indeed, since Feb. 2, 1897, holding and working the same in the usual way in the vicinity thereof, which is sufficient to vest title and establish a valid location, under U. S. Rev. St., Sec. 2332, and Nev. Comp. Laws, 1912, Sec. 4951.

23. That by virtue of such title by adverse possession, the Plaintiffs are barred of any inquiry relating to the regularity of the original acts of location, or the sufficiency thereof to initiate title and right of possession to said Salt Lake No. 3 lode mining claim.

For additional Assignments of Error upon this point see Secs. 164-169, *post*.

SECTION 124. *Section* 2332, *U. S. Rev. Statutes* reads as follows:

> "Where such person or associations, they and their grantors have held and worked their claims for a period equal to the time prescribed by the Statute of Limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property prior to the issuance of a patent."

NOTE: It will be noticed that this statute fixes and prescribes all the conditions and circumstances under which it is to operate, without reference to any other statute, except in one particular, and that is *the time* required to ripen the mining right, and begin its operation. Reavis v. Juanja 218 Fed. 16
This is left to the Statute of Limitations for mining claims of the State or Territory where the claims are. To supply this element of time, we look, therefore, to the Nevada Statute of Limitations as to mining claims, as follows:

SEC. 125. Nev. Rev. Laws of 1912:

Sec. 4951. "No action for the recovery of mining claims, or for the recovery or possession thereof, shall be maintained, unless it appear that the Plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same in the usual and customary manner of holding and working similar claims in the vicinity thereof. All the provisions of this act, which apply to other real estate so far as applicable, shall be deemed to include and apply to mining claims; provided, that in such application "two years" shall be held to be the period intended whenever the term "five years" is used, provided, further, that when the terms "legal title" or "title" are used, they shall be held to include title acquired by location or occupation according to the usages, laws and customs of the district embracing the claim."

Sec. 4956. "Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises, under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance

of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for five years, the premises so included shall be deemed to have been held adversely, except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract."

The Federal statute, U. S. Rev. Stat. Sec. 2332 has been construed and applied in innumerable cases, under every conceivable set of conditions, and its validity and operation approved, so that it seems rather late to question or dispute it. The following is a measurably full digest of the decisions.

(D) DECISIONS UNDER THE STATUTE.

SECTION 126. *Title to Mining Claims* perfected under U. S. Rev. Stats., Sec. 2332.

"Sec. 2332 would seem to recognize the doctrine that as against everyone save the U. S., the title to a mining claim acquired by possession, under, and enjoyment for a period equal to the time prescribed by the statute of limitations, is perfect."

Lindley, Mines Sec. 698, citing
Lavagnino vs. Uhlig (Utah), 71 Pac. 1046-7;
99 Am. St. Rep. 808.

"In construing Sec. 45 of the Phillipine Mining Act of July 1, 1902, (32 Rev. St., 691), the Supreme Court of the United States held that it was similar to Sec. 2332 Rev. St., and in answer to the argument that Sec. 45 of itself confers no right other than to apply for a patent, it stated that a right to an instrument that will confer title to a thing is a right to have the thing itself."

Lindley, Mines, Sec. 688, n. 27, citing
Reavis vs. Fianza, 215 U. S. 16-25.

"Where claimants take possession, hold and develop mining claims for a longer time than the period of limitations prescribed by the statute, this is sufficient to render their claim valid as against every one but the United States."

Glacier Mountain Mining Co., vs. Willis,
127 U. S. 471; 43 Fed. 236; 3 Sawy. 634;
Fed. Case No. 4989; 40 Fed. 618.

It is well settled that title to an unpatented mining claim may be acquired by adverse possession.

Costigan on Mining Law, Sec. 153, note 52,
citing

Glacier Mt. Min. Co. vs. Willis, 127 U. S. 472;

Bradley vs. Johnson, 11 Id. 689; 83 Pac. 927

SECTION 127.

The senior locators were further attacked by the junior locators by motion for non-suit, on the ground that it did not appear, from Plaintiff's evidence, that the Jesse James and Little Giant were upon unappropriated public domain of the United States at the time of their locations. The court finds in answer to this suggestion that there is some evidence to the contrary, and then brings to the support of the senior locations in respect to both, and all of their objections theretofore made, the provisions of Section 2332 of the U. S. Rev. Statutes, providing that where locators or their grantors have held and worked their claims for a period equal to the time prescribed by the Statute of Limitations for mining claims, in the state or territory where the same may exist, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto, citing many of the same authorities which we have elsewhere cited to the Court in this Brief.

Bismarck Min. Co. vs. Min. Co., 95 *Pac.,* 14

"The Court found that the Respondent had performed the assessment work on the Murphy fraction claim for nine years, beginning with 1900 and ending with 1908, and that Respondent had held, worked and was in possession of the Murphy fraction lode for more than five years from and after the 26th day of August, 1899, the date of its location, and that during said period of time, and for more than five years, after the date of said location, there was no adverse claim made to said premises or to any part thereof, and that such possession was open, notorious, exclusive and continuous for more than six years. Under the facts and circumstances of this case, to permit the Appellant to recover on purely technical grounds would be doing a great injustice to the Respondent.

Counsel for Appellant contends that the evidence is not sufficient to support the findings to the effect that Respondent has been in open, notorious, and adverse possession of said claim for a period of more than six years. On an examination of the evidence we are fully satisfied that that finding is amply supported by the evidence."

Mining Co. vs. Murphy, 109 Pac. 856.

SECTION 128.

"Title by adverse possession, logically follows

from the provisions of Sec. 910 of the U. S. Rev. Sts. requiring, etc."

Costigan on Mining Law, Section 153.

"The Bell and White Eagle claimants took possession, and held and developed them by work and labor performed, and held adverse possession of same for a longer time than the period of limitations prescribed by statute.

This was sufficient to render their claim valid against every one except the United States."

Buffalo Etc. Co. vs. Crump, 69 S. W. 576 col. 1, citing

Min. Co. vs. Willis, 127 U. S. 471; 32 L. Ed. 172;

Francoeuer vs. Newhouse, 43 Fed. 236;

420 *Min. Co. vs. Bullion M. M. Co.,* 3 Sawy. 634; Fed. Cas. No. 4989;

Harris vs. Eq. Min. Co., 8 Fed. 863.

Adverse possession of a claim carries with it adverse possession of all lodes apexing therein.

Lindley Mines, Sec. 865 N. 3;

Golden vs. Murphy, 31 Nev. 395;

103 Pac. 395-8; 105 Pac. 99.

SECTION 129.

"Plaintiff's right to the ground covered by the Canon Claim, regardless of whether or not it was subject to location as a mining claim, may be sup-

ported by adverse possession alone. Such possession would give all the ledges or veins apexing within the boundaries of the claim, and the right to follow them within its side lines, extending vertically downwards."

Golden vs. Murphy, 103 Pac. 394-8.

Sec. 2332 is applicable to lode mining claims.

Lavagnio vs. Uhlig, 71 Pac. 1051, citing
2 *Lindley*, Sec. 688;
Harris vs. Eq. Min. Co., 8 Fed. 863;
Min. Co. vs. Min. Co., 45 Pac. 1047;
Belk vs. Meagher, 104 U. S. 279-87; 26 L. Ed. 735;
(17 Cal. 38; 35 Cal. 349.)

SECTION 130.

In Min. Co. vs. Tinney, 35 Pac. (Nev.) 89, the point is illustrated.

A party had held possession for the period of limitations, sufficient to have entitled him to a patent. The rival and junior locator had, however, applied for and obtained a patent to the ground, without the senior locator (who had held for the period of limitations) having filed any adverse in the Land Office or any suit in the Courts to recover the ground, as he might have done by reason of his long possession and rights to the ground.

Having failed to adverse, his rights to the ground lapsed just like the rights of any other locator who fails

to adverse an application for patent to his ground by another, even where the locator has a perfect and unquestionable valid mining location by due compliance with all the statutes for initiating a mining location by discovery, posting, recording, etc.

If he lets the junior mining claim go to patent without adversing him,—defaults on the notice from the Land Office to come in and defend or file his adverse claim to the ground,—it is his own folly. Perhaps next time he will pay attention,—if he wants the ground.

And when the patent issues to the junior, who is thus let in by failure to adverse him, he gets a good and unimpeachable title from the Government, and the title of the prior locator, which before had recognition in law, is divested or barred, so to speak.

But this is no more than happens to anyone who is liable to process, summons, or notices from the Courts or Land Offices. Although having a good title and a good defense, if he fails to assert it, his adversary will be able to use his judgment obtained by default as an indisputable muniment of title to the property, and the Sheriff will lead him off the ground by the ears.

The junior locator being thus let in by patent, of course a new period of limitations will have to run against him before his title by patent can be affected.

(E) TITLE AND RIGHTS UNDER THE STATUTE EQUIVALENT OF A VALID MINING LOCATION UNDER U. S. REV. ST. 2320.

SECTION 131. *Title and Rights by Adverse Possession* under U. S. Rev. St., Sec. 2332 are the *equivalent of a valid mining location* under the mining laws, (S. Rev. Sec. 2320 lodes, 2333 placers,) and the other mining statutes state or federal for making mining locations. We quote first from Lindley on Mines.

> "Sec. 2332 Rev. St., providing that when parties have held and worked mining claims for the period prescribed by local statute of limitations, such possession shall be sufficient to establish a right to patent, in the absence of an adverse claim, is to be construed in connection with the remaining federal statutes.
>
> "When so construed, its effect is simply to declare that possession for the statutory period, is the equivalent of a valid location.
>
> "But possession for the required time gives the possessor the status of a valid locator.
>
> "The Land Department has construed a *compliance with this section* as sufficiently *establishing the location of a claim* and the applicant's right thereunder in the absence of any adverse claim, and

the operation of the provisions of said section is not confined to cases where the applicant is unable by reason of lapse of time, or the loss of mining records by fire or otherwise, to furnish proof of possessory title required by the mining laws."

LINDLEY ON MINES, (3d Ed.) Sec. 688, No. 33, citing
Little Emily M. & M. Co., 34 L. D. 182;
Capitol No. 5 Placer, 34 L. D. 462.

SECTION 132. *Belk vs. Meagher,* 104 U. S. 279. In this case Belk made an attempted relocation by filing all the necessary papers, opening the vein or extending it, marking boundaries and posting discovery notice on the vein.

But it was void because done before the expiration of the full year allowed to a previous locator of the ground by mining location for doing the annual work, during which time such prior locator was entitled to sole lawful possession of the ground and no new location could be validly made. When Belk entered notwithstanding, during said time, and sought to initiate a mining location, it was as the Court said, as if the acts of location had not been performed by Belk at all, and he could acquire no rights at all under such premature acts of location, which were null and void. What he did had no effect to secure him any rights to possession of the ground, and all he got

by his entry was mere possession or presence on the ground. And that to be of avail, must be actual.

PER CURIAM:

Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the *equivalent of a valid location,* by actually *holding and working* for the *required time.*

If he actually had possession and worked the claim long enough and kept all others out, his right to the patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely upon keeping himself in, and all others out, and if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got, if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others could have entered for the purpose of taking them up.

SECTION 133. *Lavagnino vs. Uhlig* (Utah), 71, Pac. 1046-51.

This case cites and quotes with approval from the cases of *Belk vs. Meagher,* supra, and *Altoona Q. S. Min.*

Co. vs. Integral Q. S. Min. Co., and upholds the same rule of adverse possession.

Quoting from *Altoona Q. S. Min. Co. vs. Integral Min. Co.*, 114 Cal. 105; 45 Pac. 1047-8, the Court said:

> "It must therefore follow that where such possession has continued for five years before the adverse right exists, it is equivalent to a location under the law of Congress."

and, in support thereof, cites *Harris vs. Equator Min. Co.*, 8 Fed. 863, *Belk vs. Meagher*, and *Anthony vs. Jillson.*

SECTION 133a.

> "One who has done the work for the statutory period, occupies the status and possesses the rights of a locator, no more, no less."

Upton vs. Santa Rita M. Co., 89 Pac. 275-84.

This decision of the New Mexican Court, in *Upton vs. Santa Rita M. Co.*, 89 Pac. 2745-84, is commented upon with approval by the Supreme Court of Idaho, which says that the great weight of authority is in favor of the rule announced in the Altoona case, and that Section 2332 is intended to obviate the necessity for the proof of posting and recording of notices of location, and the adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs as are furnished by the County Records.

Lindley Mines, Sec. 688 n. 43, citing
Humphrey vs. Idaho G. M. Co., 21 Ida. 120,
120 Pac. 823-825.

SECTION 134.

This provision (U. S. Rev. St. 2332) relates to the procedure relative to proving title. Where an adverse claim is filed in the Land Office the applicant is obliged to defend his rights in a Court of competent jurisdiction, the same as though his application were based upon a valid location;—but upon the trial, as in the Land Office, proof of possession and work for a period equal to the statute of limitations would be *equivalent to location.*

Snyder on Mines, Sec. 672.

(F) CREATES PRESUMPTION THAT LOCATION WAS LAWFULLY MADE.

SECTION 135. *Possession under U. S. Sec.* 2332, *creates the presumption* that the location was lawfully made, and this presumption, like all presumptions arising from Statutes of Limitations, is a conclusive presumption, and not a disputable one. It is not intended thereby to dispense with compliance with any of the provisions of the mining laws. But it furnishes a presumption that due compliance has in fact occurred.

"This (i. e. Possession for period of limitations) as against all adverse claimants, creates the presumption that the location was lawfully made."

Buffalo Etc. Co. vs. Crump, 69 S. W. 572; 91 A. S. R. 95-96.

Harris vs. Equator Min. Co., 8 Fed. 863;

Cheesman vs. Hart, 42 Fed. 98.

"Presumed, against adverse claimants, that the claims were regularly located."

Buffalo Etc. Co. vs. Crump, 69 S. W. 572; 91 *A. S. R.* 87.

"While possession and improvement alone give no value to a mining claim, yet they raise a presumption that the possession is rightful, and prevent the land being subjected to original location as wild and unimproved land."

Ware vs. White, 108 S. W. 831-2-3-4.

"It is presumed in favor of a purchaser, that posting of notice and all preliminary steps, were performed."

McGinnis vs. Egbert, 8 Colo. 46, citing

Harris vs. Equator Min. Co., 2 Colo. L. R. 63-66.

SECTION 135*a*.

While the general rule is that place and time of discovery and direction of the strike of the lode

must be shown (7 L. D. 6) there is a general policy of the law expressed in the statute which frowns upon any attempt to *disturb a possession and claim of long standing.* The *statute* does not relate merely to applications for patent, but it *has reference to the discovery and location as well;* since it provides that where a claimant has been *in possession* of a *mining claim,* and working and operating the same for a period of time equal to the *statute of limitations* of the state, in the absence of an adverse claim, he may *patent it without proof of discovery or location.* (Rev. St. 2332.)

And it has been held in pursuance of this statute that *after a lapse of several years,* it may be *presumed* in favor of one holding by purchase, *that a discovery was properly made, and notice properly posted.*

Snyder on Mines, Sec. 357, citing
Harris vs. Equator Min. Co., 8 Fed. 863;
McGinnis vs. Egbert, 8 Colo. 41; 5 Pac. 653.

Discovery is but one act in a *series of acts* necessary to complete a valid location.

Snyder on Mines, Sec. 358 and
Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735.

(G) TITLE UNDER SEC. 2332 GOOD WITHOUT LOCATION UNDER SECTION 2320.

SECTION 136. TITLE UNDER U. S. REV. ST. 2332 GOOD WITHOUT A LOCATION, or with insufficient location under U. S. Rev. Stat., Sec. 2320.

In other words, possession and working for the statutory period *without location,* ripened into an equitable title against the Government itself.

Lindley, Sec. 62, n. 40.

One may therefore enter upon public land, without location, and if the extent of his possession is definite his holding adversely against all the world save the Government, and his working of the claim be such, for the required period, as will indicate a continuous possession and user, he may apply for a patent, basing his application upon such possession and user.

Or one may enter upon a deed describing the boundaries of the claim, his grantor being without title, and such entry will be under color of title, and his possession will in time ripen into such a right as will authorize the Government to issue its patent, although no location was ever made.

Lindley on Mines. Sec. 688 n. 28, citing
Harris vs. Equator Min. Co., 8 Fed. 863;

Lebanon Min. Co. vs. Cons. R. M. Co., 6 Colo. 371-81.

Or one may enter under a location which is insufficient under the mining statutes, and the possession so taken may, if openly and notoriously held, and the claims worked for a sufficient period, clothe the possessor with a right, which will be recognized by the Government.

Lindley on Mines, Sec. 688, n. 29.

SECTION 137.

If Plaintiff is unable to prove a valid location in accordance with the mining laws in force, yet if he shall have actual possession under color of title at the time the Defendant entered he can recover in ejectment. And since there is no time prescribed within which the Plaintiff shall make application for a patent, his possession may in time ripen into a perfect title.

Lab. Min. Co. vs. Min. Co., 6 Colo. 371-381.

SECTION 138. *Snyder on Mines*, Sec. 672, quoting *U. S. Rev. St.* 2332: "That where a claim has been held and worked by its owners for a period equal to the statute of limitations of the state or territory in which it is situated, proof of such possession and work shall, in the absence of adverse claim, be sufficient to entitle the applicant to a patent."

"The effect of this statute is to relieve the applicant from the necessity of proving his location of the claim, the location by his predecessors, or by the furnishing of an abstract of title, as in other cases, but he is required to furnish a copy of the statutes of limitations of the state or territory, together with his own sworn statement as to the origin of his title and continuation of his possession of the ground applied for, the area thereof, the nature and extent of the work done etc."

Id. Sec. 672.

SECTION 139. *U. S. Rev. St.* 2324, providing that location of mining claims shall be distinctly marked on the ground so that the boundaries can be readily traced, and the location notice filed shall contain a description of the property by which it can be identified, and with reference to permanent objects or natural monuments, is mandatory, and must be complied with in order to secure a valid location."

Ware vs. White, 108 S. W. 831; also
95 Pac. 91.

NOTE: Yet this defect, or omission, making the location invalid and void, so no rights are gained, may be helped by adverse possession. And so may entire failure to locate as in *Belk vs. Meagher,* 104 U. S. 279; 26 L. Ed. 735.

Why may not the absence of evidence of discovery, if true, be perfected by adverse possession? Since discovery is no more essential to a location than is marking and recordation. We simply say that both, and every such legal requirement, are matters of fact in each case and as such litigable, to be established or not by judgment, verdict or findings in each case upon hearing of evidence. Being a litigious question, it is barred by limitations after the running of the statute.

SECTION 140.

For the purpose of relocation of a mining claim, the land must be subject to location, and there can be *no relocation* where the claim is in the actual possession of persons who have done the requisite amount of assessment work, *under an insufficient location.*

Ware vs. White, 108 S. W. 831.

(H) PRECLUDES INQUIRY AS TO PRIOR MINERAL DISCOVERY.

SECTION 141. TITLE TO A MINING LOCATION UNDER U. S. REV. STAT. SEC. 2332 *Precludes Inquiry as to Prior Mineral Discovery or Other Act of Location.*

If this were not true, then it would not be true that title by adverse possession is the equivalent of a valid

mining location under Sec. 2320, as shown by the citations under Section 31 hereof. It would then be something less than a *valid mining location* under Sec. 2320, for it would then be only the other acts of location minus a mineral discovery, which amounts to an invalid mining location under Sec. 2320. And the two would no longer be equivalent. If two things are equal, the equality exists without deduction from either. But see citations below.

> "In a previous article we have announced the rule that naked occupancy of the public mineral lands confers no title and that such occupancy must yield to one who in good faith and without force or violence enters upon the ground and perfects a valid location. This doctrine is, however, subject to the qualification that the possession and user has not by operation of the statute of limitations ripened into a title which is the equivalent of a location."
>
> Lindley on Mines, Sec. 688, page 1722.
>
> "The Land Department has established rules for the guidance of the applicant under adverse possession, which dispenses with the necessity for producing evidence of location, copies of conveyances, or abstracts of title. He is required in lieu thereof, to furnish a certified copy of the statute of limitations affecting mining claims for the State or Territory, together with his sworn statement giving

a clear, succinct narration of the facts as to the origin of his title, and the continuation of his possession of the mining ground covered by his location, 'stating the area thereof, and the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, and if so when the same ceased, etc.' "

Lindley, Sec. 688; citing

Gen. Min. Regs., Pars. 75 and 77, Appendix.

SECTION 142.

While the general rule is that place and time of discovery and direction of the strike of the lode must be shown (7 L. D. 6) there is a general policy of the law expressed in the statute which frowns upon any attempt to *disturb a possession and claim of long standing.* The *statute* does not relate merely to applications for patent, but it *has reference to the discovery and location as well;* since it provides that where a claimant has been *in possession* of *a mining claim,* and working and operating the same for a period of time equal to the *statute of limitations* of the state, in the absence of an adverse claim, he may *patent it without proof of discovery or location.* (Rev. St. 2332.)

And it has been held in pursuance of this statute that *after a lapse of several years,* it may be *presumed* in favor of one holding by purchase, *that a*

discovery was properly made, and notice properly posted.

Snyder on Mines, Sec. 357.

SECTION 143.

The adverse holding under Sec. 2332 U. S. Rev. St., is simply the holding of the uninterrupted possession for the period of time prescribed by the statute, which is held to be the equivalent of location. Where the validity of the location has remained unchallenged for five years (period of limitations) the *presumption* arises of a *discovery of mineral,* and a *valid location* as against one seeking to acquire the same or a part of the same area.

Lindley, Mines, Sec. 688, N. 36; citing

Vogel vs. Warsing, 146 Fed. 949-51.

SECTION 144. *Cheesman vs. Hart,* 42 Pac. 98-102.

"The evidence on both sides tended to show the long standing indications of a staked claim, and of shafts sunk or holes dug. The witnesses differed only as to precise point of such workings. The claims had stood unchallenged for years, and work of more or less importance had been prosecuted at various points on these claims years before the controversy.

"If, after all this, the Court should not tell the jury that every reasonable presumption should be

indulged in favor of the discovery of a lode by the miner it is difficult to conceive of a state of facts where such intendment should arise.

"Any *other rule,* as it seems to me, *would render such claim practically unmarketable* or *valueless in the hands of an assignee.* The miner goes, digs, and delves, and is so satisfied that he makes the survey, stakes off his claim, and then makes his location certificate, which is entered of record. After this he sells to an honest man, and passes out of view or dies.

"All the subsequent workings go to show the existence of a lode or vein on the claim of more or less importance. Can it be that after the lapse of many years, the assignee must lose his claim, because of his inability to produce the lost or the dead and prove affirmatively an actual, visible discovery by the original locator, of ore in place where he dug?

"Possibly the charge in this particular would have been more theoretically correct, had the Court told the jury that it was not necessary that Defendants should establish such discovery by witnesses to the physical fact at the time, but the same might be inferred from the fact of location, the manifestation of workings done, the long tenure of the claim,

the development of a vein on the claim by a subsequent working and from all the surrounding circumstances."

"In view of the actual proofs at the trial in this case, had the jury found for the Plaintiffs on the ground of the lack of proof of an original discovery, the court would have felt it to be its solemn duty to accord a new trial."

"Nor do I think even after 'cooling time' that the language employed respecting 'witnesses sent to those old openings with their accumulated debris to obtain evidence by inspection that no vein was in fact found by the original locators,' as also what was later on said respecting witnesses in general, was any too strong. Courts, so long as they are presided over by flesh and blood and mind, however weak or strong, must be expected to feel and think.

"Language, which is the vehicle of thought, with its seat in the heart, must reflect some tinge of the conviction of an earnest man, and while a proper judicial temper should be rigidly maintained the judge on the bench should ever feel that he is a minister of justice, and should not allow the truth to fail for lack of courageous action and frank utterance on his part."

SECTION 145.

Under U. S. Rev. St. Sec. 2324, providing for

marking the boundaries of a mining claim distinctly on the ground, so it can be identified, it has been held that statute is mandatory, and must be complied with to obtain a valid location.

Ware vs. White, 108 S. W. 831.

Yet a failure to do this was helped by adverse possession for the period of limitations. Why may not discovery?

Discovery is only one of a series of acts necessary to effect a location of a valid claim.

Snyder on Mines, Sec. 358;

Belk vs. Meagher, 104 U. S. 279, 26 L. Ed. 735.

SECTION 146. As further evidence that the inquiry as to original mineral discovery is irrelevant when rights or title is claimed under U. S. Rev. Stat. Sec. 2332, we have the line of cases wherein the owner or claimant by adverse possession, was unable to show a chain of title back to the original locators who in some instances made the discoveries, and in some cases the claimant had no conveyance at all, and no privity with any one who had ever made a mineral discovery, and therefore had only possession without mineral discovery to his or their credit. Yet their possession and title was sustained in each instance, without the discovery. See

Harris vs. Equator Min. Co., 8 Fed. 863;
Costigan On Mining Law, Sec. 153, note 55;
Risch vs. Wiseman, 36 Ore. 484; 59 Pac. 1111;
Minn. L. & I. Co. vs. Brasier (Mont.), 45 Pac. 632;

Costigan on Mining Law further cites the following cases:

Glacier Mtn. Min. Co. vs. Willis, 127 U. S. 472; 32 L. Ed. 172;

Horst vs. Shea, 23 Mont. 390; 59 Pac. 364;
South End Min. Co. vs. Tinney, 35 Nev. 89; 38 Pac. 401;
Lavaganino vs. Uhlig, 71 Pac. 1046; 99 A. S. R. 808.

SECTION 147. The following cases also hold that even where there is no chain of title back to the discoverer or locator, and no privity with any mineral discoveries by the claimant, so far as appears, he is still presumed to be the owner; and that anyone entering on the ground to search for mineral or make a conflicting location, is a trespasser and he gets nothing by his trespass and attempted conflicting location.

Gropper vs. King (Mont.), 1 Pac. 755;
Cullacott vs. Min. Co., 8 Colo. 179; 6 Pac. 211;

Seymour vs. Fisher, 27 Pac. 240; 16 Colo. 180;

Costigan on Mining Law, Sec. 152 (Note 55);

Table Mtn. Min. Co. vs. Stranahan, 20 Calif. 198.

"As against all adverse claimants, the presumption is that the location of the claims of the appellant were regularly made."

Buffalo, Etc., Zinc Co. vs. Crump, 69 S. W. 572-576, Col. 1;

Harris vs. Min. Co., 8 Fed. 863; citing

Cheesman vs. Hart, 42 Fed. 99.

SECTION 148. *Bars Initiation of Junior Location.* To this effect, but included within the principle of the previous citations and sections hereof, are the cases of

Reavis vs. Fianza, 215 U. S. 16-25;

Buffalo, Etc., Zinc Co. vs. Crump, 69 S. W. 572-8;

Bismark Min. Co. vs. North Sunbeam Co., (Ida.), 95 Pac. 14-19-20;

Walsh vs. Erwin, 115 Fed. 531-7;

Ware vs. White, 108 S. W. 831.

SECTION 149. *As to mineral discovery.* In the following, adverse possession and limitations are held to bar or dispense with the inquiry as to prior discovery on, viz:

Vogel vs. Warsing, 146 Fed. 949-51;
Cheeseman vs. Hart, 42 Fed. 98-102;
Lindley on Mines, Sec. 688 (3rd Ed.);
Snyder on Mines, Sec. 352, Sec. 672;
Belk vs. Meager, 104 U. S. 279;
Reavis vs. Fianza, 215 U. S. 16-22.

Not that in each of these cases the point as to mineral discovery was treated as pivotal to the decision, but either directly or indirectly, it was treated as of no importance where the claimant's rights were protected by limitations, and the U. S. Rev. St. Sec. 2332.

In Belk vs. Meagher, there had been a discovery made in the ground prior to the entry by Belk. Belk also saw the lode, when he entered for the purpose of locating before the ground was open or the prior location forfeited. But the U. S. Supreme Court said of Belk's entry, that because it occurred before the ground was open, it was as if he had never been there, and as if he had never performed any of the acts of location. In effect, this holds that Belk had made no discovery at all, since he had not made a legal discovery.

But the Court say, that while Belk's entry was without right, and all his acts were void, and he was a mere trespasser without a shadow or right or claim to the ground, with no discovery or acts of location which the law regarded to support him. STILL, if he should be able to keep himself in, and keep others out for the stat-

utory period he would have a good lode mining location under the U. S. Rev. St. Sec. 2332, if he never performed the acts of location.

SECTION 150. *As to possession and working.* The following decisions from the Land Department are in point:

"The law does not require a locator of a mining claim to remain in actual physical possession thereof at all times, but the performance of assessment work annually, stands in lieu of such continued possession."

22 L. D. 624-8.

See sec. 483-485 post.

And:

"It is not necessary to a title by adverse possession under U. S. Rev. St. 2332 that the claimant shall personally have been in adverse possession of the claim for the period fixed by the statute. It is sufficient thereunder that the claimant and his grantors have held and worked the claim for such period."

Paul B. Warnekros, 41 L. D. 653.

"$100.00 Annual labor dispenses with the necessity for further acts of possession."

Borgwardt vs. Oil Co., 130 Pac. 418, Col. 2.

SECTION 151. *What Constitutes.*

It is well settled that to constitute adverse possession, there need not be a fence, building, or other improvement be made. It sufficies for this

purpose, that visible, notorious acts are exercised over the premises in controversy for the required period of limitations, after an entry under claim and color of title.

Ewing vs. Burnett, 11 Pet. 42-52; 9 L. Ed. 624.

The continued claim and possession of the property by such acts of ownership as a person would exercise over property which he claims in his own right, and would not exercise over property which he does not claim, are sufficient.

Ewing vs. Burnett, 11 Pet. 42-52; 9 L. Ed. 624.

SECTION 152. *Rights of Purchaser on the Record.* The following cases treat the rights of a purchaser of record, as lifted above and immune from the questions which might have been raised against the validity or regularity of the original location in the hands of the locators before conveyance thereof:

Lavagnino case, 71 Pac. 1051;

Harris vs. Equator Min. Co., 8 Fed. 863;

Min. Co. vs. Min. Co., 6 Colo. 381;

Risch vs. Wiseman, 59 Pac. 1111;

Buffalo Zinc Etc. Co. vs. Crump, 69 S. W. 572-6;

Manuel vs. Wulff, 152 U. S. 510; 38 L. Ed. 532;

Jantzen vs. Copper Co., 20 Pac. 93.

The cases hold that mining claims are property, real estate in the highest sense, descendible and vendible as such, and that the Courts will go far, in their presumptions and construction of the law, to protect good faith mining locations and investments.

SECTION 151a. In view of the presumptions attending the operation of a statute of limitations, it must be that all questions as to the performance of any and all of the things requisite to an ordinary mining location are barred thereby. Actions for damages and to recover on a promissory note, are not the only things that are barred by the running of limitations. Criminal prosecutions are barred by lapse of time. Filing of mechanic's liens in the local records are usually barred after a time certain. Many other remedial steps are barred by a time certain. Even the filing of an adverse in the Land Office is barred if not attended to in time. Many other acts which do not constitute steps in court procedure may be barred. Congress has seen fit to enact that mining claims shall become incontestable by junior would-be locators after the period of the local state statute of limitations. Having provided for adverses and their disposition by action in the State Courts, it had the right also to provide that after a time certain, there shall be no conflicting locations and hence no adverse suits to be based thereon. Like all other limitations, Sec. 2332 is a statute of repose,

and the presumptions springing therefrom are conclusive. In the interest of society, it is said, after a time certain, dissensions shall cease, and contests shall be barred. It is in *pari ma eria* with Sections 2325-2326, which say that (if the conflicting junior location does occur within two years), he must adverse the senior's application within sixty days, and bring a suit within 30 days more, or be barred. And if the junior applies for patent, the senior also must adverse and bring suit by a time certain, or be barred.

SECTION 152a. If Sec. 2332 were not counted an absolute bar to litigious questions affecting the validity of mining locations, it could have no effect whatever, and the statute would be nullified. If it is not a statute of repose against one question, such as mineral discovery, it would not set at rest any question. If it will perfect the title of a second locator against the charge of invalidity by a third locator, arising from the existence of a first location, in existence at the time the second was made, which is a very vital and sufficient ground of invalidity, it will also protect the second or first location against the charge of invalidity arising from a supposed failure to make a mineral discovery in aid of such location.

In either case supposed, the invalidating fact is one that can only be established by a judicial inquiry, and evidence in the adverse suit, and if the making of a junior location after two years is barred in the one case, it is

also in the other; and in either case if the making of the junior location is barred after two years, then there can be no adverse filed, based thereon, and if no adverse, then no adverse suit, no evidence, judicial investigation or decision and judgment. And if no judicial inquiry, there can be no evidence as to non-discovery of mineral or as to prior location invalidating the senior location. All these things are inter-dependent, and it is readily seen that Congress intended by Sec. 2332 to bar and prevent every litigious question after the period of the state statute of limitations.

SECTION 153. If Sec. 2332 were not intended as a bar to every and all litigious questions affecting mining locations, then it could not bar any such questions, for the courts are not authorized to select the instances in which the statute will operate. If it will perfect *B's* location otherwise invalid because in derogation of *A's* location not yet forfeited, as in *Lavagnine vs. Uhligh and Belk vs. Meagher,* it will also settle the question of a prior mineral discovery or no.

Section 2332 gives a right to patent without other showing than holding and working for two years. If one invoking the statute must answer all questions of this nature, then the following, from Southern Dev. Co. vs. Enderson, 200 Fed. 272-275, and Roberts vs. Southern Pacific Co. et al., 186 Fed. 934, with reference to the effect of a patent, would also apply to the effect of

Section 2332, for, as the U. S. Supreme Court said in Reavis vs. Fianza, 215 U. S. 16, "the right to a thing that entitles one to a patent, is a right to the patent itself." Said the Court in the Enderson and Roberts cases:

> "The patent is the last step in conveying the Government title to the grantee. Of what avail would such an instrument, intended for peace and security of the holder, be if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation by strangers to the title? As well might it be contended that questions of fact in respect to the marking of boundaries of a patented mining claim, or the previous discovery of mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the Courts subsequent to its issue."
>
> "In respect to such contention, this Court said in Doe vs. Mining Co., 54 Fed. 935-940: 'If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode or ledge was discovered within them, or because the statutory requirements of the

posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. * * * The very purpose of the patent is to do away with the necessity of going back to the facts upon which it was based."

But a United States patent is no more sacred or effective to accomplish its purpose and object than is a United States statute. And, by the same token, if the United States limitation statute as to mining claims shall not operate to protect a mining claimant against charges of non-parallelism of end lines, posting, recording, or non-discovery of mineral, when is it to operate, and when will any interested litigant keep hands off of the statute and permit Congress to have its way?

SECTION 154.

"Under U. S. Rev. St. 2332 it is not necessary for the applicant to show the initiation of his right at all, but merely possession and working of the claim for the period equal to the statute of limitations of the state in which the claim is situated."

Hickey vs. Anaconda Copper M. Co., 33 Mont., 45-46; 81 Pac. 806.

SECTION 155.

"The appellees who claim to own the Panamara claim, are Clum, Cochran and Briggs. They

claim to be the owners as purchasers and not as locators. As the original locator and his witness were absent from Alaska (where trial occurred), their affidavits could not be obtained."

"The validity of the location had been unchallenged for more than five years, and up to the time of the commencement of the present action. It has been held that under such circumstances, the certificate of location creates the presumption of discovery of mineral, and of a valid location. Harris vs. Equator Min. Co., 8 Fed. 863; Cheeseman vs. ~~Shreeve~~ Hart, 42 Fed. 98."

"Especially should such a presumption be indulged where a subsequent locator attacks the title of a prior locator, or that of his successor in interest."

"In view of these considerations, we are not authorized to say that the Court erred in denying the injunction sought for, on the ground that the location notice failed to mention the discovery of gold on the claim."

~~A lien must be foreclosed, and if not redeemed from, may result in title to the purchaser at sale, but itself~~

Vogel vs. Warsing, 146 Fed. 949-51.

(I) LAVAGNINO VS. UHLIG, AND SIMILAR CASES.

SECTION 156. Lavagnino vs. Uhlig, 71 Pac. 1046-47. This case was a square out-and-out holding that title under U. S. Sec. 2332 will be recognized and protected. There was an additional element in the case which has at times caused counsel to dispute with us the effect of the decision in the Supreme Courts of Utah and of the United States. The facts were these:

> *A* made a mining location on the public domain.
>
> Before expiration of A's time for annual labor, and while not in default, *B* entered and attempted to make a second location.
>
> After the year, and *A* being still in default, *C* entered and made his mining location. But meantime *B* had been in possession for the time required by the Utah statute of limitations for mining claims.
>
> Thereupon *B* applied for a patent and *C* aaversed him, but *A* defaulted and dropped out, and the question was wholly between *B* and *C*.
>
> The Utah Court held with B on two grounds, viz:
>
> 1. A having failed to adverse B, he was out, and B being ahead of C in time, was prior in right.

2. B having held for the period of limitations, was protected under U. S. Rev. St. Sec. 2332.

The case went to the U. S. Supreme Court on review and was decided and reported in 198 U. S. 443, 48 L. Ed. 1119, affirming the Utah Court entirely on the strength of proposition 1, supra, omitting reference apparently to proposition 2. But the U. S. Supreme Court's decision in 198 U. S. was reversed by itself in Brown vs. Gurney, 201 U. S. 184, 50 L. Ed. 717, as to proposition 1, as generally predicted by the Courts of the mining states, because not in conformity to the previous decision in Belk vs. Meagher, 104 U. S. 279, which Courts refused to follow the decision on proposition 1 prior to its reversal in Brown vs. Gurney.

But proposition 2 in Lavagnino vs. Uhlig was never disputed by the Courts. For instance, the Supreme Court of Nevada in Nash vs. McNamara, 93 Pac. 405, said that the Utah Court was probably correct in Lavagnino vs. Uhlig on the ground of the statute of limitations and adverse possession, while disagreeing with it on the other branch of the decision.

And in Lockhart vs. Farrell, 86 Pac. 1077-8-9, a later case in the Utah Supreme Court itself, the Court observed concerning the Lavagnino case that:

> "The trial Court decreed to the applicants the possession of the ground described within the boundaries of their claim."

"On appeal to this Court (Utah Supreme) that judgment was confirmed on the ground taken by the trial Court, and further because of the bar of the statutes of limitations.

"Upon appeal to the Supreme Court of the United States the trial Court was again confirmed. In doing so it was necessarily assumed, among other things necessary to a valid location, that the locators of the Uhlig claims discovered a vein or lode not within the boundaries of a then valid and subsisting claim, but upon unoccupied mineral land of the United States."

(J) CONTENTIONS OF DEFENDANTS IN ERROR.

SECTION 157. As we have more leisure now than we may have later for the purpose, we will now notice some of the contentions of Defendants in error on this branch of the case.

It has been contended by them that adverse possession or rights under the U. S. Rev. St. 2332 do not begin to run or accrue in favor of a claimant of a mining location until after the issuance of patent thereto. We need only reply to this by citing the statute itself, and all of the foregoing decisions under this chapter.

They cite in support the following cases:

Nessler vs. Bigelow, 60 Calif. 98;

McTarnahan vs. Pike, 91 Calif. 540; (27 Pac. 784)

South End Min. Co. vs. Tinney, 22 Nev. 221; 38 Pac. 401);

Tyee Cons. Min. Co. vs. Langstedt, 136 Fed. 124;

Tyee Cons. Min. Co. vs. Jennings, 137 Fed. 863.

The cases cited do not hold as claimed. Under the facts set forth in the opinions, those cases hold no more than this viz:

> That where one claims by adverse possession, and another person, making a subsequent location on the same ground, applies for and obtains from the U. S. Land Office a patent, or a certificate of purchase, that then the defense of limitations cannot be urged against the Government of its patentee or vendee.

Of course, not. Any one will lose rights in a mining claim, no matter how good those rights may be, if he fails to file an adverse and prosecute a suit in support thereof. His rights may be based on a valid location in accordance with the mining laws, or upon adverse possession for the period of limitations, "which is the equivalent of a location." In either case his rights will lapse by failure to intervene when patent is applied for, by another under the express provisions of U. S. Rev. St. Sec. 2325-2326.

The difference between those cases and these two at bar is that the Plaintiffs here do not occupy the position of patentees or holders of certificates of purchase preliminary thereto, for the land in controversy in these actions. They therefore cannot repel our plea of limitations, under the cases cited.

In the *Langstedt case*, supra, the rule announced was:

> "The statute of limitations does not begin to run against a grantee of the United States until the issuance of a patent."

But the Plaintiffs here are not grantees or patentees of the United States. When they acquire that status it would be time enough for them to invoke the above rule, in opposition to our plea of limitations and adverse possession.

They are now merely adversing for a patent.

> *Horst vs. Shea*, 23 Mont. 390; 59 Pac. 364, holds that a statute similar to Nevada Statute 4951, is inapplicable to the status of patented mining property. The latter is covered by the limitations statute, which protects other deeded property.

SECTION 158. They cite Humphreys vs. Mines Dev. Co., 40 L. R. A.; (N. S.) 819, note 21 Idaho 126, 120 Pac. 823, to the contention that evidence of mineral discovery is necessary even where a title is perfected under U. S. Rev. Stat. 2332.

We say that point was not involved, and not so decided in the Humphrey's case, but if it was, there is sufficient evidence of discovery furnished by the location certificate or notice of a claim which recites discovery of a lode, vein or ledge.

Bismark Min. Co. vs. Min. Co., 95 Pac. 14-18; citing cases;
Strepy vs. Clark (Colo.), 5 Pac. 111;
Jantzer vs. Copper Co., 20 Pac. 93-4;
Vogel vs. Warsing, 142 Fed. 949-51; citing
Harris vs. Min. Co., 8 Fed. 863;
Cheeseman vs. ~~Shreeve~~ Hart, 42 Fed. 98.

And also in the presumptions which attend the operation of the statute of limitations and U. S. Rev. 2332 itself. See Secs. 135-135a hereof. But it is not so held in the Humphrey's case. There was just two questions raised and decided in that case, and the necessity of a discovery, proved by the claimant under limitations, is not one of them. The points decided are:

1. As to the sufficiency of the showing made by defendant therein in support of his application to open default and permit him to answer the complaint.

2. As to the sufficiency of the answer tendered and application to open default, which alleged adverse possession for the period of limitations as a basis of his title.

The averments of this tendered answer are set out in the opinion on Page 824, column 2, and they are about parallel with the same defense in our answer in these two suits.

The Court held the averments as made to be sufficient defense of title by adverse possession. The necessity of discovery was not an element in the pleaded defense, and is not contained therein. So there was no decision called for or made on that subject, unless it be that a discovery is implied in the fact of title by adverse possession to a mining claim; and this does not help out Plaintiffs here any.

SECTION 158a. *Valid, whether Mining Ground or No.*

> "The Plaintiff's right to the ground covered by the Canyon Claim, regardless of whether or not it was subject to location as a mining claim, may be supported by adverse possession alone."
>
> *Golden vs. Murphy,* 31 Nev. 395-8; 103 Pac. 394-398

SECTION 158b. Adverse Claim. They say the U. S. Rev. St. Sec. 2332 cannot operate where there is an adverse claim. If the statute had not already repeatedly received a settled construction at the hands of the U. S. Supreme Court, the Land Department, and the State Courts, there might be excuse for this mistake. If the filing of an adverse claim would prevent the operation of

the statute, furthermore, then it never could operate, and there never would be an opportunity to plead the statute, nor for the courts to enforce it. For a statute of limitations is not self-operative, and must be pleaded to put it in motion. If the filing of the adverse claim prevents the operation of the statute, then it can never operate, because it is the filing of the adverse claim and the beginning of suit in 60 days, which gives the Courts jurisdiction to hear and decide at all. And until this occurs, no pleading occurs, of the statute or anything else, and no opportunity for the Courts to O. K. or refuse rights under any statute.

SECTION 159. In Cowan vs. Maclay, 40 Pac. 602, the Supreme Court of Montana fell over this stumbling block, and inadvertently held the impossible, viz: that Sec. 2332 could not operate where there is an adverse claim. In so doing it not only tethered a U. S. Statute, but a U. S. Supreme Court decision as well, in the case of Mining Co. vs. Willis, 127 U. S. 471; 32 L. Ed. 172. but the Montana Court took a distinction that in the latter case there was a *valid mining location.* The distinction is unsound. For what is a valid mining location, other than the possession of evidence to show compliance with the law in making the location. And if one has this, of what particular value would the statute of limitations be to him? U. S. Sec. 2320 would be sufficient, prescribing discovery, location, monumenting, recording, etc. Sec. 2332 would then be

useless and improvident legislation. Manifestly Sec. 2332 was intended to protect those who had held and worked their claims for the period of limitations, but for some reason could not prove every fact in the original location. 2 Black (U. S.) 5-99

SECTION 160. But the Supreme Court of Montana itself recovered from its mistake in *Hickey vs. Anaconda Copper Min. Co.* 33 Mont. 45-65; 81 Pac. 806, a later case, wherein it decided that:

> "it is not necessary for the applicant to show the initiation of his right at all, but merely possession and working of the claim for the period equal to the statute of limitations of the state in which the claim is situated."

Which overthrows Cowan vs. Maclay, and puts Montana with all the other Courts on this subject.

SECTION 161. The decision in Cowan vs. Maclay which Montana thus discarded, was never recognized by any other Court, save that Colorado seemed at one time to give it a little countenance in Cleary vs. Skiffich, 28 Colo. 362, 65 Pac. 59, in which the Court took occasion nevertheless to say that proof of possession for the required time would be sufficient to presume that all steps necessary to effect a location had been made.

SECTION 162. When this much is conceded, we have all we contend for, and so there is really no dissent on this question. After all, it is the province of the U. S.

Supreme Court to finally settle all questions arising under the U. S. Mining laws, and its opinions are law.

Glacier Mt. Min. Co. vs. Willis, 127 U. S. 471; citing cases;

Reavis vs. Fianza, 215 U. S. 16-25;

Bismarck Min. Co. vs. Min. Co., 95 Pac. 14-19 (Ida.);

Buffalo Etc. Co. vs. Grump, 69 S. W. 572-6; 91 Am. St. Rep. 87;

Risch vs. Wiseman, 36 Or. 484; 78 Am. St. Rep. 783;

Walsh vs. Erwin, 115 Fed. 531-6; 59 Pac. 111;

Cheeseman vs. Hart, 42 Fed. 98-102;

Costigan on Min. Law, Sec. 153, note 54;

Barklage vs. Russell, 29 L. D. (Dep. Int.) 401;

Min. Co. vs. Min. Co., 9 Nev. 240;

Altoona Min. Co. vs. Min. Co., 45 Pac. 1047;

Upton vs. Santa Rita Min. Co., 89 Pac. 275-289, 283-4.

SECTION 163 and the Land Department:

"Adverse possession and the statute of limitations is a bar to a new entry and location upon the ground, and the statute U. S. Rev. Sec. 2332 is available, *even in the face of an adverse claim.*

Stewart vs. Rees, ~~20~~ 21 L. D. 446-50.

(K) ADDITIONAL ASSIGNMENTS OF ERROR.

SECTION 164. *Additional Assignments of Error* under U. S. Rev. Stat. Sec. 2332. Furthermore, because the essential propositions of fact in this chapter are undisputed, and the law is clear, the Court below should have peremptorily instructed the jury to return a verdict for Plaintiff in error, defendant below. For its failure to do so, we assigned error, viz:

Assignment No. 42 (Sec. 674 post.)

After the close of all the evidence, and prior to the argument to the jury, the Defendant requested and moved the Court in writing to peremptorily instruct the jury to return a verdict in favor of Defendant, in the following words, viz:

> "The Court instructs the jury to find a verdict herein in favor of the Defendant."

The Defendant now refers to the bill of exceptions heretofore filed in this cause, and prays that for the purpose of pointing the error herein complained of, the same may be considered herein incorporated in its entirety as fully as though herein reiterated in *haec verba*.

The Court at said time, overruled Defendant's motion and request, and refused to instruct the jury as requested by Defendant; and Defendant excepted to such refusal, and now assigns the same as error.

SECTION 165. *Same.* For the same reasons, and based upon the same citations of law and fact, the Court erred as alleged in the following assignment of error.

Assignment No. 43 (Sec. 675 post.)

Prior to the argument to the jury, the Defendant in writing requested the Court to give to the jury, the following instructions, viz:

> "The Court instructs the jury that if you find from the evidence that the Defendant and his grantors had entered and held possession of the lode mining claims involved in these actions, and worked the same in the usual and customary way in the vicinity thereof, for a period of two years prior to the making of the placer locations of the Plaintiffs, then the law presumes in aid thereof, that all the acts necessary to a valid location of said lode mining claims had been done and performed at the time of such mining locations, and that such possession (having the legal effect of a location under the law) is sufficient to give the Defendant's grantors a lawful right to the possession of said mining claims, if kept alive as required by law, as against the subsequent placer locations of the Plantiffs' grantors."

There was evidence without conflict that Defendant's grantors had held possession of the ground in dispute under the Midas, Evening Star and Salt Lake No.

3 Lode locations, in the usual way with mining claims in the vicinity thereof, with all annual labor performed, for more than two years prior to the alleged Homestake Placer location, and of all facts covered by the instruction asked.

The Court denied said request and refused to give said instruction, to which the Defendant called the Court's attention and excepted and now assigns said ruling as error.

SECTION 166. *Same.* And also in the following:

Assignment No. 44 (Sec. 676 post.)

Prior to the argument to the jury Defendant requested the Court in writing, to give the following instruction to the jury.

> "The Court instructs the jury that proof of two years open, adverse continuous and exclusive possession of lode mining lands, under claim of right by a claimant, as a lode mining location, and during such time working the same in the usual and customary way of working such mining claims in the vicinity thereof, has all the force and effect and is the full legal equivalent of all the acts and things necessary to be done to initiate a valid location of such lode mining claim. And if you find from the evidence in this case, or these cases, that the Defendant and his

predecessors had been so in adverse possession of the Salt Lake No. 3 Midas, and Evening Star lode mining claims, or either thereof, for such period of two years at any time prior to the attempted locations of the Homestake and Guy Davis Placers, respectively, then the Defendant's grantor or grantors, was a lawful locator by virtue of such adverse possession and working at the expiration of said period of two years, independent of any other act or acts of location."

There was evidence without conflict that Defendant's grantors had held possession of the ground in dispute under the Midas, Evening Star and Salt Lake No. 3 lode locations, in the usual way with mining claims in the vicinity thereof, with all annual labor performed, for more than two years prior to the alleged Homestake Placer location, and of all facts covered by the instruction asked.

The Court refused to give said instruction to the jury, to which ruling Defendant duly excepted and called the Court's attention, and now assigns the same as error.

SECTION 167. And in the following:

Assignment No. 46 (Sec. 678 post.)

Prior to the argument to the jury, Defendant requested the Court in writing, that the Court should give to the jury the following instruction, viz:

"The Court instructs the jury that it is not necessary to the exercise of lawful possession by the Defendant and his grantors over the lode mining claims involved in this action, the Salt Lake No. 3, Midas and Evening Star, that they or their agent or employee should reside or remain continuously upon each of said lode mining claims during all of the time of such possession, but it is sufficient if the Defendant or his grantors, his or their agent or employees. were in position to and did have such supervision, dominion or control over said mining claims as their nature admits of, and such as is usual and customary with the owners of like property in the vicinity thereof."

There was evidence of supervision, dominion and control and improvements on the Midas, Evening Star and Salt Lake No. 3 lode mining claims by Defendant's grantors, and of the other facts covered by this request.

The Court refused to give said instruction to the jury, to which ruling and omission Defendant called the Court's attention, and excepted, and now assigns the same as error.

SECTION 168. And the following:

Assignment No. 47 (Sec. 679 post.)

Prior to the argument to the jury Defendant requested the Court in writing that the Court should give to the jury the following instruction, viz:

"The Court instructs the jury that if you find from the evidence that the defendant and his grantors were in possession under valid locations of their lode mining claims involved in these actions either by way of adverse possession and working, or by virtue of a compliance with the laws for initiating such lode mining locations, that such possession relates to all the ground covered by and included within the exterior side and end lines of said locations as denoted by the boundary monuments upon the ground, relating to each claim respectively, during all the time that such possession continued, and not to any less portion of said claim or claims."

There was evidence of facts constituting a valid location and title, in each of the ways suggested in this request.

The Court denied said request and refused said instructions to which Defendant called the Court's attention and excepted, and now assigns the ruling as error.

SECTION 169. *Same.* And the following:

Assignment No. 48 (Sec. 680 post.)

Prior to the argument to the jury, Defendant requested the Court in writing that the Court should give to the jury the following instructions, viz:

"The Court instructs the jury that if at the time of the initiation of the lode mining claims or locations herein involved by Defendant's grantors

or at any time thereafter prior to Plaintiff's placer locations, mineral bearing rock in place was discovered on the said lode mining locations by the locators or owners thereof, but at some point not midway between the side lines thereof, but east or west from such center line, and the required amount of location work was performed thereon according to the law at the time thereof as elsewhere instructed, and the owners held adverse possession of said claims according to the boundary monuments upon the ground for two years prior to Plaintiffs' placer locations, then the Court instructs you that such adverse possession related to all the ground embraced within the exterior lines of said locations as monumented, and it is immaterial to the rights of the Defendant and his grantors, where the point of discovery within such exterior lines, was or occurred."

The Court refused to give said requested instructions, to which Defendant called the Court's attention and excepted, and now assigns such refusal as error.

(L) RELIEF ASKED.

SECTION 170. For the reasons pointed out in this chapter, we ask the Court to adjudge the absolute right, title, and right of possession, purchase and patent for the ground within the Salt Lake No. 3 lode mining claim to

be in the Plaintiff in error, and that the judgment below be reversed, and the adverse claim of the Defendants in error be rejected.

(M) ABSTRACT OF ALL EVIDENCE AS TO POSSESSION AND WORKING THE SALT LAKE NO. 3 LODE CLAIM BY PLAINTIFFS IN ERROR AND HIS GRANTORS.

SECTION 171. The testimony as to the original location of the Salt Lake No. 3, the conveyance in the title, reference to the assessment work, admission of counsel, and Court rulings are contained in Secs. 115 to 119, *supra*. The following is supplementary as to all acts of possession, so as to set out all the evidence.

Rec.,
Page

Joseph Jurey testified:

644 I have lived in Copper Canyon 15 years, since May, 1898, except in 1914 lived in Copper Basin and went to the canyon. Since 1898 I have been employed in Copper Canyon as miner, caretaker and foreman,
645 working for The Glasgow & Western Exploration Co. They were the owners of the Salt Lake No. 3, Evening Star and Midas and other claims. I lived in a little cabin on the west side of the Salt Lake No.

Rec. Page

3, also my brother and other men, maybe 10 or 20 at times. I was foreman 10 years; they used to work a while and shut down a while, the pay rolls will show all that—the last 10 years. Been foreman since 1906
646 or 1907.

In that time, we made a road to the mill, and changes in the road up the canyon, from west to east side. Road to mill built on Salt Lake No. 3 in 1912, and in building it found some small veins. I
647 was looking after the men working on it; I never tried or assayed the veins, looked to carry gold; one vein about foot wide between walls.

648 In 1913 a little shaft was sunk in southwest corner Salt Lake No. 3, 12 or 15 feet deep, 4x6, used a windlass and two sets timbers; two men working on it, don't know how long. Cost with timbers may be $100. Also, they were working on the mill in 1913; grading out for the benches and tanks. That work was done before September, 1913, under the direction
653 of The Glasgow & Western Exploration Co., who was then the owner of the claim. Men were then living in the houses on the Salt Lake No. 3.

651 Also, shaft on Evening Star sunk in 1913, 33 feet deep, vertically, and 25 feet on incline, 53 feet in all. Size 5x6 feet, with timbers used, worth more than

Rec. Page

$100; done in summer, 1913, before September. In
653 all 85 feet of shafts sunk on the three claims in 1913, under direction of The Glasgow & Western, and for it. At that time there had been no locations made over the three claims. Found placer gold in the gravel in that shaft, and a little in the shaft on the Midas and Salt Lake No. 3, not much.

662 The road led to the mill, and to the main shafts of the Company the old copper mine, from which ore was treated at the mill.

664-668 In 1898, and for a number of years, work was performed, repairing the pipe line, which took water to the houses, barns, etc., and on the drain pipes and the houses. Pipes froze in the winter and sometime we had to dig out a mile and a half of it, and all through the Salt Lake No. 3. And the houses we would put on new shingles, battens, and floors.

674-5 Men were paid specially for watching this property during my employment, at $3.5[illegible] day; those men were not watching all the time, but part, and part time working on the other claims of the Company.

792, 1167, 1181 Sundry affidavits of annual labor on the Midas, Evening Star and Salt Lake No. 3, on behalf of The Glasgow & Western Exploration Co. offered in evidence, some of them objected to, and some were not. Ruling reserved.

Rec. Page

679 I know the Farrin tunnel or adit, in Salt Lake No. 4, the mouth of it about 200 feet north of the Salt Lake No. 3; the work in that adit was done in 1908 and 1909, it is about 1000 feet long, and some drifting off from the cross-cuts about 300 feet, and an upraise in the tunnel about 200 feet. There were 12 or 14 men employed all the time on that in 1908 and 1909; 5 per cent copper ore exposed in that.

In sinking the shafts on Salt Lake No. 3, Midas and Eastern Star in 1913 powder and fuse were used.

682 When the men were employed on the group of claims, of which the Midas, Evening Star and Salt Lake No. 3 were a part, they were paid for all their work on all the claims, and not separately for their work on any one claim.

I was present when the men were paid for their work, they signed the pay rolls all the time; I know their handwriting on the documents (pay rolls) now shown me. Counsel for Plaintiffs admit the witness knows and can identify all the signatures on the pay rolls. Pay rolls offered in evidence.

684 Some twenty claims in that group.

685 Objection to pay rolls.

687 Sustained. Exception.

Rec. Page

The pay rolls show over $100,000 paid in labor alone on the group of claims.

686 THE COURT: I do not suppose there will be any question on the part of the Plaintiffs that the amount of work done on that group of claims exceeded $100 for each claim.

MR. THATCHER: Oh, no.

687-8 Identifies photos Defendant's Exhibit 12, showing the houses that were there in Copper Canyon in 1898, which witness and the other men lived in until the new houses were built. Put in evidence.

689 Identifies also photos of houses as they are now, new and old. They were in that condition before location of the placers in 1913. Includes also the mill and leaching plant. Put in evidence as Defendant's Exhibit No. 13.

(Both photos show numerous houses and buildings on Salt Lake No. 3, new and old, bunk houses, office, boarding house, mill, leaching tanks, etc.)

655 When working in the canyon I was paid for my work there on the Salt Lake No. 3, by check, monthly, by mail, all the time I worked there. The checks were sent to myself. Pay rolls offered, objected. rejected,
656-9 exception. The Company also owned the adjoining mining claims to these during all the time I was em-

Rec. Page

660 ployed there. The men were paid day's wages. During those years the mining work was done around the old copper mine, the Copper Canyon mine. The Company owned a mill, which it built in 1912 and 1913, partly on Salt Lake No. 3; and the tanks were built on
661 Salt Lake No. 3.

Excavating was done 1912 and 1913 for the roads, and mill; don't know the cubic yards, but took several
662 months to build the road on Salt Lake No. 3; it was all blasting.

662-3 Counsel for Plaintiff below admits the cost of value of that road was at least $500 and the excavation for the mill within Salt Lake No. 3 was at least $1000. The road went up to the mill and beyond to the main copper mine, from where the ore was taken and treated at the mill. These were group claims and adjoined each other.

772-3 The Farrin adit runs easterly and is a little higher than the Salt Lake No. 3, and if continued in same direction, or any upraise from it, would not strike the Salt Lake No. 3, or Midas or Evening Star. But you might sink a shaft from the Eagle tunnel or Farrin adit, and then drift into the Salt Lake No. 3, Midas and Evening Star. Would not have to sink far from the Farrin adit, as they are practically the same altitude.

Parker Liddell testified:

Rec. Page

544 Is mining engineer and U. S. Mineral Surveyor. Gives qualifications. Knows the Salt Lake No. 3, Midas and Evening Star; made survey for patent of the group of claims of which they are part in the summer of 1913, June, July, and part of August. I had certified copies
547 of the location certificates, and was given indications of the positions by residents on the ground; referred to the Company's maps, and took especial notice of the
548 monuments on the ground. Gives in evidence the official plat and field notes on the patent survey, as Defendant's Exhibit No. 4.

Identifies map, Defendant's Exhibit No. 5, made by B. F. Tibby, as a correct representation of the claims it represents, except in a few minor details; general position and topography correct. Map, Exhibit 5, put
554 in evidence.

The patent survey was made before Sept., 1913, yes, when the placer claims were located, yes. I filed the plat of these claims with the surveyor-general, yes, there were 16 claims in the group, I believe.

741 I surveyed these three claims in June, 1913; there
743 were 16 claims in the group surveyed. Began on the Midas and ran out the lines of the claims. Ran out the boundaries, tied in the work and such improvements as I found on the ground. I found practically
747 all the boundary monuments.

Rec. Page

I found all the boundary monuments of the several claims, and they were, I think, without exception rock monuments, with either 4x4 posts about 4 feet long, or 2x4's nailed together, making 4x4. All were in place. The corner and side center monuments of the Midas and Evening Star were marked, that is, marked with pencil or crayon. The northern corners of the Midas and Evening Star, and I believe the northern corners or all the corners of the Salt Lake No. 3 were rock with posts in them, and the posts were badly weathered, so any writing was not discernible, except the northwest corner Salt Lake No. 3, where I could distinguish all or part of the word "Sal-"; further than that could not be certain of corner markings Salt Lake No. 3.. I found two small shafts
752 in the northwest part of Salt Lake No. 3; the road to the mill in the northeast part of the claim, cut along the hillside up through the mill. Mill is on division line between Salt Lake No. 3 and Salt Lake No. 4
753 claims. Small shaft in southwest part of claim in the wash. Old well, covered by timbers near the roadway near stable between stable and water trough. And mill cut.

For several months in summer, 1913, I was in and about the neighborhood making the patent surveys for all these claims of the group.

Rec. Page

754 When I was there the 8th this month (May, 1915), the cut just west of the mill had been run, exposing a vein—down quite a few feet below the mill road. Also cuts and excavations for the mill.

753-4 All three claims cover the smaller hills adjoining the immediate Copper canyon and vicinity, actual formation and rock in place visible in many places. Described the outcroppings at sundry places.

836-7 Prevailing rate wages in Copper Canyon in 1912 and 1913 reported as $4 per day. They haul supplies from Battle Mountain, 18 or 20 miles, by road.

889-938 BENJAMIN F. TIBBY, a mining engineer and expert, testified to a number of open-cuts, shafts, and tunnel on the Salt Lake No. 3, Midas and Evening Star, chiefly surface workings, but his testimony relates chiefly to the subject of veins and lodes in the ground, to be covered elsewhere. The dimensions of said workings will be given herein, later.

Joseph Ralph, Plaintiff in Error and Defendant below, testified:

942 Resident and citizen of Salt Lake City, Utah.

943 Mining engineer. Gives extended mining education and experience in many countries, and over many years' duration.

945 First became acquainted with the Copper Canyon group of claims, including Salt Lake No. 3, Midas and

Rec. Page

Evening Star, in 1912, when he was sent there by the owner to examine them.

946 There was a contiguous group of claims, it would be impossible to speak of one more than another.

Of the group workings which tended to the development and economic benefit of the Salt Lake No. 3, Midas and Eastern Star, in about May, 1912, there was erected on the Salt Lake No. 3 a plant, the purpose of which was to save the copper values by leaching, the first preparatory work, such as grading, etc., in May, 1912. And they had a few men working opening up the old Virgin shaft, which is 590 feet deep on a
947 60-degree incline, dipping toward the Salt Lake No. 3 with large ore bodies exposed; one face of copper there is 15 feet wide and will assay 7.5 per cent copper, and it was their intention incidentally to open up the main shaft. (Intention objected to and stricken out.)

They were opening up the main shaft for the purpose of operating; there was considerable work going on. I arrived in April, 1913, and I found a great amount
948 of money was owing; operations had been undertaken without the home office knowing anything about it. (Objected to as unnecessary digression.)

—Well, the building of that mill; the road had been constructed, and they were opening up the main shaft, I believe, when the work was suspended.

Rec. Page

I know the Farrin adit, yes, adjoining the Salt Lake No. 3.

Q. Describe generally to the jury the character of that adit, and its significance, if any, to the development of any of these claims?

949 A. The Farrin adit is about 1000 feet long, with quite a considerable drifting and raising, which runs in an easterly direction, the portal being 200 or 300 feet north of Salt Lake No. 3. The adit was run in 1908 and 1909, according to the pay rolls which I have here, and that adit could quite conceivably be used for the economic development of not only the Salt Lake No. 3, but of a great number of other claims, and undoubtedly was devised for that purpose.

There are two principles involved, physical and economic continguity, which I would explain in this way: When the Farrin adit was run, there was existing, open and developed ore bodies at the main copper mine. The portal of the Farrin adit is about 250 feet lower than the collar of the Virgin shaft, which is 505 feet deep vertically. The Farrin adit on the horizontal plane is only about 250 feet below the collar of the Virgin, and approximately 250 feet from the bottom. And that adit was run off slightly to the north from the main Virgin shaft, so that if con-

Rec. Page

tinued it would not strike the Virgin shaft proper, but there were other principles involved.

At that point there is an intrusion of quartz
950 diorite, which my technical advisers assure me is the genesis of the copper deposits at Copper Canyon, and undoubtedly it has a great influence on the physical conditions there as well as the general metallurgical conditions. And it was evidently the hypothesis of the old management that if they went to work at the Virgin shaft, which was on the southern extremity of the copper bodies, and worked from there, they would be faced with two conditions: 1st. They would be at the extreme south end of the hogback, where the main virgin copper deposits are; and 2nd, they would be faced with opening up an old crooked shaft, with bumps in the foot wall, which went off laterally; that is, the main virgin shaft.

So it was evidently the idea of the old management to run this new Farrin adit in, and to see first whether the main copper lodes of the Copper Canyon passed through that dioritic intrusion and continued to the north; and if they had done that, that would be point No. 1 of great economic importance.

Point No. 2 is that if, on the way in, they encountered other lodes, then any lateral work done on those immediate lodes would give them a lateral swing, as it

Rec. Page

were, to devise a new shaft at a point which would
951 be of direct, exact and comprehensive economic import to the whole group.

Evidently they had that idea in view, because although they spent $25,000.00 approximately on the Farrin adit, its portal was still 250 feet above the bottom of the Virgin shaft; so there must have been a broad general scheme of development.

952 That would be a possible and reasonable development plan for the whole group, including the three claims here in controversy; it certainly would.

954 I know the cost of the mill, leaching plant and buildings built on the Salt Lake No. 3 in 1912, yes. I know because I paid the bills myself.

Q. What was the cost?

954-5 Question objected to; objection sustained. Exception. Hard to say when I first saw the actual outside boundary monuments of these three claims.

956 (Witness testifies to the different surface open-
to ings and excavations on the Salt Lake No. 3, Midas
993 and Evening Star claims, but chiefly in connection with his testimony as to lodes and veins therein. Dimensions of the cuts and openings will be given later herein.)

966 Witness was asked if he knew the cost of build-

Rec. Page

ing the road on Salt Lake No. 3. Objected to by Plaintiffs.

Objection sustained. Exception (Record, p. 967.)

967 The mill itself was designed and erected at that point upon a general principle which tended toward the economic import of the whole group; that any mineral on the ground anywhere, no difference whether on the Salt Lake No. 3 or the John-John claim up at the head of the gulch, it would be impossible to dis-
968 associate the erection of that mill and the installing of it there, without for that purpose.

Offer renewed as to the cost of the mill.

Objection renewed; sustained; exception.

978 Counsel for Plaintiffs below admitted here that at the time they located the Guy Davis the six monuments of the Salt Lake No. 3 were up and in place, and a location post at each of the points designated on the map, and that is the condition they found them.

993 On the Evening Star claim, in year 1913 prior to September, certain work was done under my own direction, consisting of a shaft which went down vertically 33 feet, then went off on an incline, about 53 to to 55 feet altogether, at the point indicated by "D" on
994 Defendant's map, Exhibit 5—"26"—on Plaintiffs' Exhibit A.

Rec. Page

That point is at the neck of the canyon—the lowest point of the very lowest claim of The Glasgow & Western property. That was done in May or June, 1913, long before any jumping of claims. A shaft at that point, being the lowest point, would benefit all
995 three of the claims, and develop the placer at the lowest point in the canyon, which by that time I know existed.

The shaft would serve a two-fold purpose. I wanted a shaft to develop the placer at its lowest point. The wash or over-burden resting upon the solid formation is at that point approximately 55 feet deep. A shaft sunk there and running on up the gulch on the pay channel would not only develop the placer, but would lay bare the course of nature's book, any lode could not come up without being intersected.

It was done both for lode and placer mining, with the object of assessment work for the Evening Star and the two contiguous claims. The incline ran toward the east approximately. The shaft was sunk
996 on the left hand side of the road going up, and that is on the west rim of the gulch. The incline had to dip east in order to get to the channel. That was a proper way to develop the three claims in both a lode mining and a placer mining way—absolutely. The cost
997 of it, not much less than $500; to be conservative, $400,

Rec. Page

with wages at $4 per day. $400 is the minimum value, regardless of the cost.

In sinking that shaft I discovered placer gold.
998 When the incline in going down came to that point where the bed rock started going up, rising again, toward the east, naturally the lowest point or depression, was the channel, and in the channel there was very fine values. With Mr. Christensen we took out
999 about 20 pounds of dirt, or 30, and from that Mr. Dahl washed out 3.3 ounces of placer gold, exact weight, worth $6.00.

999-1000 Before sinking that shaft on the Evening Star, had had one sunk in the southwest corner of the Salt Lake No. 3 and one in the northwest corner of the Midas, other than for assessment work, then stopped and told Joseph Jurey to sink the shaft at "D" on Exhibit 5 map, so that all work done there would have every phase of economic import to all three claims, that being the lowest point.

I paid for the bunk houses and office buildings built on Salt Lake No. 3 in 1912, yes.

As to whether any men worked on the Salt Lake No. 3, Midas and Evening Star I can only surmise from the pay rolls. I made some payments myself, but they were not allicated on the books as regards
1001 particular purposes. For instance, mining is alli-

Rec. Page

cated under mining, development work under development; mill construction under another, leaching under another, and houses under another. So I could not say where any particular man worked.

1001-2 Plaintiffs below objected to the cost of the buildings. Objection sustained. Exception by Defendant.

1002 As to the shafts sunk on the Salt Lake No. 3 and Midas, it was reported there were values, but I never went down; I knew they had reached bed rock, and whatever values found above bed rock would not bear on the situation strongly.

I made application for a patent for the Salt Lake No. 3, Midas and Evening Star claims.

Q. When did you first conclude to make application for patent to those three claims?

1003 A. It was either the latter part of May or 1st of June, 1913, in which I secured the necessary authorization from the Land Office or the Surveyor-General and made my deposit in the National Bank of the Republic in Salt Lake City, to cover the fees, and I retained Mr. Liddell at the same time, as surveyor to do this work.

It is already in evidence when he did that work.

Cross-examined about the Farrin adit, witness says:

Rec. Page

1025 The entrance of that adit is about 300 feet northerly from the Salt Lake No. 3, and runs in easterly direction.

1026 On the principle of economic contiguity it could well apply. I can well see that it might have been of great economic value.

If continued in the same direction, or any direction, it could not cut the Salt Lake No. 3, no; on the same level it is now or has been run, by running directly ahead or in a circle it could not; might touch it, but not amount to anything. But its tendency

1027 to devolop lay in this: that if the main copper lode had continued north through the diorite, the Farrin adit would have intercepted it. And if any feeders from that had either come southerly, or if there were other claims intervening between the Virgin shaft and the Salt Lake No. 3, that adit would have intercepted them, and then would come to the matter of drifting upon those veins; and if the drifting was southerly, a shaft there sunk would not only develop the Salt Lake No. 3, but also be of direct physical contiguity with the main virgin ore body. In other words, they could very well, by drifting on intermediate veins come down there practically between the Virgin shaft and the Salt Lake No. 3 cross-cut east, tap the virgin ore body, the copper ore body, cross-cut west

Rec. Page

and come to the Salt Lake No. 3, and into the quartzite.

The adit is 250 feet above the bottom of the Virgin shaft, and would hit the Virgin shaft in about the middle, yes. The top or collar of that shaft is
1028 about 250 feet higher than the Salt Lake No. 3. Extended on the same level in any direction it would not hit the Salt Lake No. 3, or Evening Star, might have got into the Midas; I have a map from which I can give the measurements, if desired, would have to go about 1800 feet to the Midas; as to how deep will have to get out my map.

1029 (Q. Refresh your memory afterward.) The Virgin shaft dips west, yes, and the Virgin vein dips west, 60 degrees west. The Superior ore body, distant about 300 feet, dips westerly also; and the main copper or bodies, copper veins, all dip west on that Virgin hogback.

1029-30 If I were going to devise a central scheme for development of the canyon, it is possible that I might develop a better one—it is a matter of opinion.

Questioned about a certain report gotten up and mimeographed by witness for distribution, but not yet submitted to anyone, in which witness had expressed an unfavorable opinion as to the purposes
1031 and results of the Farrin adit, witness said:

Rec. Page

We are looking at it now where they started that Farrin adit, in the hopes that those lodes would continue through the diorite, and if there were intervening lodes, then the scheme would work. But as the scheme did not work, it is now very easy to come back and condemn. As I said before, they took a big gamble—I would not take it myself.

Q. There were no lodes discovered in the adit, were there?

A. Yes, there are some lodes there; there are lodes of copper.

1032 I was there in the end of December, 1912; I could see the men working around the road there and on the mill; could not say exactly what they were doing. I was only on the ground about 10 days in December, 1912.

1033 Every foot of the road is in blasting rock.

1060 Exhibit A-9 of Plaintiffs below, put in evidence, shows application of Plaintiff in Error, Defendant below, for a mineral patent for the Midas, Evening Star, Salt Lake No. 3, and 13 other lode mining claims, subscribed by F. D. Brown as attorney in fact, filed in the U. S. Land Office at Elko, Nev., June 22, 1914; Application No. 01544, Survey No. 4175. Reciting that the applicant, Joseph Ralph, has become the owner

1061 in possession of said mining claims for which appli-

Rec. Page

cation is made, bearing gold, copper and other precious metals, together with the surface ground, etc., as shown by plat and survey thereof, etc., situated in Battle Mountain Mining District, Lander County, Nevada.

Joseph Jurey:

1066 The office building, boarding house and bunk houses were built in the winter of 1912-1913.

Value of said houses objected to and excluded by the Court.

1067 The tools were used on all the claims including the Salt Lake No. 3, Midas and Evening Star.

1068 Men lived in those houses in 1912 and 1913.

1070-1 There were lots of men working on there; worked several months. When they quit they took the drills and tools down to the houses, most of them.

1071 I was watchman, and watched the property.

1092 Defendant below offered in evidence a certified copy of a tax record of Lander County, Nevada, showing payment of taxes for the period from 1904 to 1914 upon the buildings and improvements on the Salt Lake No. 3, to show good faith and exercise of rights of dominion over the property by Defendant's grantor.

Objection by Plaintiffs below; sustained; exception.

SECTION 172. *Excavations.* **There are certain cuts and excavations from the surface of the ground in said**

Salt Lake No. 3 lode mining claim, testified to by Defendant's witnesses and also by Plaintiffs' witnesses. We give them as they testified to finding them on the ground when they arrived in Sept., 1913, and began to overrun the ground and attempt conflicting locations.

SECTION 173.

Open cut K on map, Exhibit "A." (Record, p. 293.)

Small shaft at lower end. Record, p. 294.)

Placer shaft in southwest corner. Record, pp. 232-233-234-307.)

Shaft near well. (Record, p. 334.)

Sundry other excavations. Record, pp. 354, 334.)

Some recent development work done by The Glasgow & Western. (Record, pp. 232-233-234.)

CHAPTER IV.

REGULAR MINING LOCATIONS.

Section

(A) Title of Plaintiff in Error to the lode claims by regular mining location, under U. S. Rev. St., Sec. 2320, and State Statutes 174

Assignments of Error.

(B) The Testimony, etc., Showing *Prima Facie* Valid Mining Locations 178

(C) The Presumptions of Law 180

(D) Sufficiency of Evidence, Decisions 181

(E) The Complaint, No Averment of Invalidity 189

(F) Burden of Averment and Proof on Junior Locator 191

(G) Mining Claim as Real Estate 200

(H) Trespass in Locating on Senior Ground 207

(I) Additional Assignments 208

(J) Relief Asked 212

(A) TITLE OF PLAINTIFF IN ERROR TO THE SALT LAKE LODE CLAIM BY REGULAR MINING LOCATION, UNDER U. S. REV. ST., SEC. 2320, AND STATE STATUTES.

SECTION 174. *Title by location.* We assign as error that:

Assignment No. 41. (Sec. 673, post.)

The Defendant now assigns the following grounds of insufficiency of the evidence to support or sustain the judgment and verdicts herein.

1. The evidence was insufficient to show that the ground included within the boundaries of the re-located DAVIS LODE CLAIM (sometimes called the Guy Davis lode claim, and Guy Davis placer), was at the time of such re-location, vacant, unoccupied or unappropriated public land of the United States, subject to location.

6. That said re-location of the Guy Davis claim occurred on Sept. 5, 1913.

9. The evidence shows that the Salt Lake No. 3 lode mining claim was located on Feb. 2, 1897, by one J. H. Clive, recorded Feb. 6, 1897, and was conveyed by him in 1898 to The Glasgow & Western Exploration Co. and by mesne conveyances, came to be vested in the Defendant, and that tthe latter acquired in good faith in reliance on the

record. That the Defendant and his grantors have highly improved the property and made it valuable.

SECTION 175.

Assignment No. 49. (Sec. 681, post.)

Prior to the argument to the jury, Defendant in writing requested the Court to give to the jury the following instruction, viz.:

> The Court instructs the jury, that if you find from the evidence that at the time of the entry and making by the Plaintiffs or their grantors, of the Homestake placer and the Guy Davis placer, the Defendant or his grantor, was in possession of the ground, or any portion thereof, covered by such placer locations or filings, under and by virtue of prior location or locations, as lode mining claim or claims, and the performance of annual labor or improvements thereon during the same or the preceding year, according to the legal requirements as elsewhere herein explained to you, then you are instructed that the entry thereon and the making of said placer locations was unlawful and void, that the same were in law trespasses on the rights and possession of the Defendant; that all their steps of alleged discovery of minerals, the posting or recording of notices, or the monumenting of said placers was ineffectual; and that the Plaintiffs, and

their grantors acquired no rights whatever by reason of said placer locations.

There was evidence of actual prior possession of the ground in dispute herein by Defendant's grantors, and of all the facts suggested by this request.

The Court denied said request and refused to give said instruction, to which the Defendant called the Court's attention and excepted and now assigns said ruling as error.

SECTION 176.

Assignment No. 60. (Sec. 692, post.)

2. That the said general insufficient verdicts, and each thereof in the case, are severally special in form or substance upon which to base any judgment, or award any relief whatever against the Defendant, or in favor of the Plaintiffs herein.

Assignment No. 61. (Sec. 693, post.)

2. That the judgment is against the law, because the evidence herein is insufficient to support, sustain or justify the same, in each of the particulars herein specified under Assignment No. 41.

SECTION 177. The foregoing assignments will cover the immediate propositions we have to discuss, although said assignment No. 42 also covers our locations as acquired under U. S. Rev. St., Sec. 2332 as well as under Sec. 2320.

(B) THE TESTIMONY, ETC., SHOWING PRIMA FACIE VALID MINING LOCATIONS.

SECTION 178. The following evidence shows sufficient *prima facie lode* mining locations under U. S. Rev. St., Sec. 2320, and the mining laws of Nevada, by the grantors of Plaintiff in Error to the Salt Lake No. 3 lode mining claim. And in the absence of anything alleged against it sufficient to legally invalidate, is perfect and unquestioned, preventing any subsequent entry or conflicting locations.

SECTION 179. *John* Jurey testified:

Rec. Page

560-1 On Feb. 2, 1897, we located the Salt Lake No. 3. We went to this piece of ground, found a lode in place, and put a monument on there. My brother, Joseph Jurey, and William T. Jurey, were with me.

Found mineral-bearing lode, yes. It was quite a large outcrop of mineral-bearing matter sticking up out of the ground; there had been some work done there by people in the early days, and they had **throwed out a little dump** there, **uncovering this lode**. We placed our monument on this dump and located this lode. Judge the vein was about 18 inches wide. It contained iron and copper stains, and I should say

Rec. Page

chloride in the quartz. I should say the quartz would carry gold and would assay. I made no assay.

562 I made no tests or pannings; never heard of pannings in them days. In my opinion at the time I found it, it would carry assay values in gold and silver. I could not give an opinion as to what the values of the
563 rock was, as I never had an assay made. Remember distinctly the appearance of the rock. Would say it carried values, but cannot tell how much. The vein was sticking out of the ground in places, and other places it was worked on, dug down a piece.

The vein was of different material from the country rock on each side, in this respect—that it was ledge matter, and the country rock is country rock—different altogether.

564 After finding the ledge, we built a monument, I helped to erect it, about 4 feet high and 2 feet through, made of rock and a piece of timber, 4x4, to my best knowledge.

My brother put the location notice in. I wrote them myself and gave them to him. I didn't fill in the number of feet—I didn't know the distance from there back to the end line.

I made this location for J. H. Clive.

565 (Paper handed witness for identification. That

Rec. Page

is an old notice I found on the Salt Lake No. 3, on the 13th of the present month (May, 1915).

571 At the discovery where there was mineral in place,
572 I said it was different from the country rock. The ledge matter between the country rock forms itself different altogether from the country rock; the place was about this size (showing) up from the ground. Seemed of different material from the country rock. It was iron colored, and chloride mixed through the quartz. The ledge matter dipped easterly. In my judgment as a practical miner, should say that was a vein. It carried mineral of value.

574 I judge the vein was about 18 inches wide. Between the walls it was all ledge matter. It had stains of copper and chloride that would carry gold and silver as well.

Joseph Jorgy testified:

600-1 Qualified as a miner.

Helped to locate the Salt Lake No. 3 on Feb. 2, 1897. We first discovered a ledge; didn't take long;
602 four of us there looking; found a ledge a foot to 18 inches wide, in place; it was iron and gold-bearing rock or ore, it looked to me. It was different from the surrounding country rock; could see the two walls, plainly, yes, sir. The vein dipped easterly, and ran
603 northerly and southerly.

In my opinion as a miner it carried sufficient minerals to warrant making a location of a mining claim, yes; and in my judgment carried values in gold, metal or mineral, yes.

We were then in the employ of J. H. Clive and Johnson. If I were prospecting in my own behalf I would make a location on such a discovery as we made there in 1897.

We then built a monument on a little dump that had been made there, about 8 or 10 feet, I judge, from the discovery of ore.

Then we paced off our ground, William T. Jurey
604 and myself, while my brother and the other man went off to locate more claims northerly up the canyon. Then we monumented the boundaries, corners and side centers. Size and markings. Location notice prepared by my brother, handed me, except filling in those distances between the several corners and location monument. I paced out and put in the distances in the
605 location notice and put it in a little can, and put it in the discovery monument.

605-6 Identifies the ancient location notice in frame, Defendant's Exhibit No. 6; first saw that on 13th May, 1915; looks like the notice I put in the can and the can in the monument. It is the original location notice I posted on the Salt Lake No. 3 and in my brother's handwriting; the distances I filled in.

606 Identifies tin can, Defendant's Exhibit No. 7, as the can that the Notice, Exhibit 6, came out of on 13th May, 1915, on the Salt Lake No. 3 claim. My brother and Mr. Ralph were with me at the time it was found.

607 My brother found it on the northern part of the claim.

614 We were directed by Mr. Clive and Johnson to locate this ground. We found the vein exposed in this cut, lengthwise; the cut ran along the vein itself, and you could see it in the bottom, yes, and in the face of the cut as well. That face was about 4 or 5 feet high, may have been over.

615 I didn't go down in it, nor clean it out, but I walked over to the end where the cut comes up, and you would not have to go in to ascertain whether it was a ledge or not. You could walk right along and see it, right inside. We didn't assay nor pan it; didn't know what panning was. Made no test, merely relied on my general experience as a miner, and rock that I had seen before and after.

569 Defendant's Exhibit No. 8 reads as follows:

"NOTICE OF LOCATION."

570 "This is to certify that I, the undersigned, hath this day located and claim 1500 feet on this lode (or ledge), running in a northerly direction, 255 feet from this monument, and in a southerly direction, 1245 feet. I also claim 300 feet on each side from center of lode

with all dips, spurs and angles. This mine is to be governed by the United States and district mining laws and is to be known as Salt Lake No. 3, situated about the houses at Copper Canyon, Battle Mountain Mining District, Lander County, Nevada.

"Located February 3rd, 1897.

"Locator, J. H. CLIVE.

"Filed for record Feb. 5th, 1897, and recorded at request of Mr. Clive in book F, p. 39, of Mining Records, at 20 minutes past 11 o'clock a. m., Feb. 6th, 1897.

"JOHN MELLANDER,

"District Recorder.

"By Della Mellander.

"Filed and recorded at request of Della Mellander, Feb. 8th, 1897, at 25 minutes past 3 o'clock p. m., in book No. 1 at page 353 of Duplicate Mining Notices, records of said Lander County, Nevada.

"M. D. MURPHY,

"County Recorder."

There was a large amount of testimony as to assessment work and affidavits of annual labor, showing that all work had been done, but we need not cite to the pages of the record, because Plaintiffs admitted the assessment work had been done (p. 684), and the Court instructed, at pages 1225-6, that there was no question or issue as to

the annual labor, or of forfeiture. ~~And this fact appears in counsel's statement at the argument also~~.

SECTION 180. We also refer to the evidence collected in Secs. 115-120 and 171-173, *ante*, as showing the original location of the Salt Lake No. 3, its marking and recording, and the establishment and maintenance of the boundary stakes, and some other particulars, with conveyances, in chain of title, and admitted performance of all annual labor, as the court instructed.

We have therefore a perfect *prima facie* lode mining location of the Salt Lake No. 3, from which every presumption of title, possession and right of possession arise, and which the Courts will recognize and protect, until some cause or ground of invalidity be alleged and proved against them.

(C) THE PRESUMPTIONS OF LAW.

SECTION 180-a. *The legal presumption.*

"The existence of a mineral location raises the presumption that the location has been lawfully made and conformed with the law, and that the land covered thereby is mineral in character."

Walker vs. R. R. Co., 24 Land Dec. 172.

"The location certificate is when recorded *prima facie* evidence of all the statute requires it to

contain, and which are therein sufficiently set forth."

Bismark Mi . Co. vs. Min. Co., 95 Pac. 14-18, citing:

O'Reilly vs. Campbell, 116 U. S. 418; 29 L. ed. 669;

Garfield Min. Co. vs. Hammer, 8 Pac. 153 (Mont.); Same in 130 U. S. 291, 32 L. ed. 964.

Goldberg vs. Bruschi, 81 Pac. (Cal.) 23.

Strepy vs. Clark, 5 Pac. (Colo.) 111.

Jantzer vs. Copper Co., 20 Pac. 93-4.

"It will be presumed that a man being a resident of the United States, and who has made a mining location, was a citizen of the United States; that he properly marked the ground; and that he recorded the same within the time the location notice recited these facts."

Jantzer vs. Copper Co., 20 Pac. 93.

"In favor of a purchaser, or a successor in interest to the original locator, the certificate of location creates a presumption of discovery of mineral and a valid location."

Vogel vs. Warsing, 146 Fed. 950, citing:

Harris vs. Min. Co., 8 Fed. 863.

Cheeseman vs. Shreeve, 40 Fed. 791.

Cheeseman vs. Hart, 42 Fed. 98.

Buffalo &c Co vs Crump 69 S. St. 5

"Where one claims what *prima facie* belongs to another (apex question), a more rigid rule of construction prevails against the claimant."

Min. Co. vs. Min. Co., 83 Pac. 648.

"As between a prior and a subsequent locator of the same ground, the Courts will view the evidence tending to establish the senior locator's discovery and location, in the most favorable light that such evidence will justify."

Ambergris Min. Co. vs. Day, 85 Pac. 109.

"Actual possession, admitted or proved, makes out a *prima facie* case, and throws upon the other party the burden of proving a superior right in himself."

Golden Fleece Min. Co. vs. Cable Con. Min. Co., 12 Nev. 312.

"In a possessory action, proof of possession of a mining claim is always *prima facie* evidence of title."

Lebanon Min. Co. vs. Con. Rep. Min. Co., 6 Colo. 372.

"And since there is no time in which such person must apply for a patent, his possession may in time ripen into a perfect title."

Lebanon Min. Co. vs. Con Rep. Min. Co., 6 Colo. 372.

Harris vs. Equator Min. Co., 2 Colo., L. R. 634.

"A recorded location notice, with proof of keeping up the assessment work, and monuments on the ground corresponding with those in the notice of location, is sufficient to establish *prima facie* title."

Jantzer vs. Copper Co., 20 Pac. 93.

Whether Appellant's possession was aided by Sec. 5363, Kirby's Digest, is not important, because the *prima facie* presumption of the rightfulness of Appellant's possession, alone prevents the land being subject to original location as wild and unoccupied mineral land.

The Appellant's compliance with the law requiring $100 worth of improvements per annum under a defective location notice, gave them a possessory right which is presumed rightful, in the absence of a better right being shown.

Ware vs. White, 108 S. W. 831-4.

Ware had the possession contemplated of mining claims, by the actual physical work required, and the work was there as evidence of possession.

* * *

Ware's possession and requisite annual assessment work under a defective location, is sufficient to defeat a recovery on a patched re-location, where

there is no peaceful entry and posssion of the land, nor work done under it.

Ware vs. Ware, 108 S. W. 834.

(D) SUFFICIENCY OF EVIDENCE, DECISIONS.

SECTION 181. *Evidence and sufficiency of discovery.* Independent of the presumptions attaching to a mining location apparently regular on its face, and flowing from a certificate of location reciting discovery of a vein or lode, we have sufficient evidence of the fact to establish a location, in the testimony of Joseph ~~Jurey~~ Jory and John Jory (Sec. 179, *ante*). Of course, we do not have to establish at that stage (date of location) the existence of *pay ore* in the lode or vein, but only the existence of the lode or vein between well-defined walls in the country rock, and different in character or material from the country rock.

This is Hornbook law, but we cite in support 27 Cyc., 556, note 47, where a multitude of decisions on this point is collected. By examining them it will be found that many of them were locations that were based on evidence of mineral discovery less decisive than that in this case.

"If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spend-

ing his time and money, it is sufficient as against a subsequent locator for mining purposes."

Muldrick vs. Brown, 61 Pac. 429, citing cases.

The facts in the Muldrick case were about parallel to those in the case at bar, with additional parallel facts of a junior placer claimant seeking to oust the prior lode locator by evidence of no discovery (based, however, upon an allegation to that effect in the complaint).

In *Lange vs. Robinson,* 148 Fed. 801, the Court says:

"It will be noticed from the foregoing statement of facts that prior to making the locations under consideration, Plaintiff did not actually discover gold in paying quantities upon the claim he located, but he did find some small quantities of gold therein."

"Was this sufficient, etc,?"

Held it was, and the rule in *Book vs. Justice Min. Co.,* 58 Fed. 106, adhered to; quoting liberally also from the decisions in 77 Fed. 249; 87 Fed. 807; 197 U. S. 313; 49 L. ed. 770.

SECTION 182. *Pay ore.*

"It is enough if it has a present or prospective value."

68 Fed. 811; 99 Pac. 176-8.

"It need only be such as a miner can follow, expecting to find ore.

Shreve vs. Min. Co., 28 Pac. 315-320, col. 1.

"Need not contain ore sufficient to pay a profit, to justify location.

Id., and

Cascaden vs. Bartolis, 146 Fed. 740.

Charleton vs. Kelly, 156 Fed. 436.

In *Davidson vs. Bordeaux,* 15 Mont. 245-252; 38 Pac. 1075, the testimony of the witness Smith was just parallel to that of the witness ~~Jurey~~ Dory in this case concerning what he had seen at the point of discovery on the lode claim when located. He took no assays and made no tests or other efforts to ascertain or determine values, until some time after the location was completed. It was held that

"in the absence of evidence that the vein was not a good one,"

there was sufficient evidence of a discovery of a mineral-bearing vein *before the location.*

SECTION 183. *U. S. Supreme Court decision.*

"A vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral, or mineral-bearing rock, and the boundaries. With either of these things well established, very slight evidence may be accepted of the other.

"A body of mineral, or mineral-bearing rock in the general mass of the mountain, so far as it

may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied.

"On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode.

"Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a lode or vein."

Mining Co. vs. Cheesman, 116 U. S. 529, 29 L. ed. 712-4.

Iron S. Min. Co. vs. Mike & Starr Min. Co., 143 U. S. 404, 36 L. ed. 204.

Snyder on Mines, Sec. 349.

SECTION 184. *Rule in Book vs. Justice Mining Co.*, 58 Fed. 107.

"A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute.

"The vein may be very thin, and it may be many feet thick, or thin in places—almost or quite "pinched out," in miners' phrase—and in other places widening out into extensive bodies of ore.

"So, also, in places, it may be quite or nearly barren, and at other places immensely rich.

"It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, * * * within the lines of the claim located, to make a valid location, including the vein or lode.

"It may, and often does, require much time and labor, and great expense, to develop a vein or lode, after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary, before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense in case a rich mine should be developed."

SECTION 185. *Other decisions.*

"It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore."

Shreve vs. Min. Co., 23 Pac. 320.

"Mr. Justice Field's definition and discussion of the term 'lode' in the Eureka case, of Sawy, 302, has long been an authority. We cite but briefly as follows:

"As used by miners, before being defined by any authority, the term 'lode' simply meant that for-

mation by which the miner could be led and guided. Its is an alteration of the verb 'lead.'

And whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and outside of which he could not expect to find ore, was his lode."

Shreve vs. Min. Co., 23 Pac., 320 Colo. 1.

SECTION 186. *Effect of some evidence of vein,* as against junior attacking location.

"Where prior to the time Plaintiff's grantor staked out a placer claim, Defendant had taken steps to appropriate the same as a lode claim, and there was some evidence of mineral-bearing rock on the surface, but an entire absence of evidence that there was not a vein of metallic ore such as might be located on as a vein or lode claim—Defendant's right to possession was superior to that acquired by the Plaintiff."

Bevis vs. Markland, 130 Fed. 226.

In *Muldrick vs. Brown,* 61 Pac. 428, the testimony of the locator in regard to mineral discovery was simply:

"that before locating the claim he discovered within its limits a quartz ledge which he traced quite a distance, but did not make any measurements."

HELD: Sufficient evidence of discovery and valid location.

Substantially the same facts and rulings in:

Shoshone Min. Co. vs. Rutter, 87 Fed. 801-807.

Score vs. Griffin, 80 Pac. 331-2.

Bevis vs. Markland, 130 Fed. 228-9.

See Sec. 389-407.

SECTION 187. This field of citation is almost limitless. But we need not pursue it further at this time, as we are solely concerned with the effect of a *prima facie* location of the Salt Lake No. 3 lode claim at its date of location so far as the purposes of this chapter go. This is made out by the location certificate alone, as to original discovery testimony, and our citations of cases thereon. And it is kept alive by counsel's admission of unfailing annual labor thereon and absence of forfeiture; and by the Court's instruction to the jury to the same effect.

Secs. 118 and 119 hereof.

SECTION 188. The Salt Lake No. 3 lode claim was therefore a *prima facie* valid location on Feb. 2nd, 1897, or when the location papers were recorded. The conflicting Guy Davis re-location of the Defendants in Error was not attempted to be initiated, however, until Sept. 5th, 1913. See their Exhibit "B" and "C" (Record, pp. 236-237.) It was, therefore, upon him to allege and prove something against the validity of Plaintiff in Error's *prima facie* valid prior locations of the ground, if they would prevail in this action, as junior locators of the same ground.

(E) THE COMPLAINT, NO AVERMENT OF INVALIDITY.

SECTION 189. *The complaint in this case* does not allege one single ground of invalidity, or fact constituting invalidity, of the Salt Lake No. 3. It gave them no color of prior existence even, not to speak of invalidity. It simply sets up the impossible contention (impossible in view of their own evidence), that their own location, under the Guy Davis, was prior in time to the Salt Lake No. 3. That they were first upon the ground. And they claimed the first right to the ground under said Guy Davis re-location, by virtue of a compliance by them or their predecessors with

> "the mining laws, rules and customs, and by actual prior possession, location and discovery thereof by these Plaintiffs, their grantors and predecessors in interest." (Record, pp. 15-16.)

And this was denied in our answer. (Record, pp. 20-21.)

SECTION 190. *The issue.* Under this complaint they cannot claim the benefit of any issue as to the Salt Lake No. 3 being first but invalid for any cause, but they could at most, if their complaint was otherwise sufficient, contend as to which locations were first in time, theirs or

ours. If their Guy Davis was first, they would get the ground; if our Salt Lake No. 3 was first, we would get it. And this could be proved by the record in the County Recorder's office, and perhaps by contributing testimony agreeing therewith.

We do not say their complaint is in fact otherwise sufficient, but we will get to that anon.

Their issue as made and tendered is not sustained, because of the earlier date of our lode location.

(F) BURDEN OF AVERMENT AND PROOF ON JUNIOR LOCATOR.

SECTION 191. *Burden on junior locator,* to allege and prove invalidity of senior location.

> "It is upon a party seeking to litigate or defend a right to the possession of mining ground, based upon the hypothesis of the invalidity of the senior location of such ground, to allege and prove the facts claimed as invalidating the senior location." Lockhart vs Farrell 210 U.S. 142;
> *Willison vs. Ringwood,* 190 Fed. 549.

The invalidating facts claimed in the Willison case was the existence of a prior location to the senior claim at the time of the initiation of the latter claim, and it was held that the junior should *allege* and prove that fact,

and also that it had not been forfeited or abandoned at the time the senior claim was located.

"The location is the inception of the grant; the patent is its consummation. The grant evidenced by a valid location continues operative and in full force, so as to protect the ground from subsequent location until the title thereby acquired has become forfeited by failure to comply with the law.

A valid location, and the grant thereby evidenced, remains in full force and effect, until something is alleged and proved against it to defeat the grant.

The second locator must allege and prove that the right of the first locator has gone, before his location has any validity."

Renshaw vs. Switzer, 13 Pac. 127-128.

SECTION 192.

"Plaintiff in a mining adverse suit must establish, in addition to the other requirements of the law, that the ground was not covered by a prior location at the time of his own location, or if it is apparent from this testimony that the land was previously covered by a prior location, that such location was invalid; or that the prior locator had forfeited or abandoned the claim."

Moffatt vs. Blue River G. Ex. Co., 80 Pac. 139.

"The burden is upon the Plaintiffs, as a second or subsequent locator, to affirmatively prove their prior and present valid location of the ground. They must establish that the Defendant's location was never made, or if made, that it has been abandoned or forfeited prior to the Plaintiffs' location."

2 Alaska 496.

See cases cited in Secs. 349-362, *post.*

SECTION 193. *In Russell vs. Hoyt*, 2 Pac. 25, it was held that a party could not introduce proof of a lack of mineral discovery in the mining claim of his opponent, where there was no such a averment in the complaint.

That such is the established rule of pleading, where a junior mining locator desires to overturn or question the validity of a prior location is shown in the following cases; where the pleaders strictly conformed to the rule, and tendered a specific issue of fact in each case as constituting the supposed ground of invalidity, viz.:

Phillips vs. Smith, 95 Pac. 91.

Muldrick vs. Brown, 61 Pac. 428.

Cunningham vs. Pirrung, 80 Pac. 329-30 (re-location).

Durgan vs. Redding, 103 Fed. 914,

but in *Thornton vs. Kaufman,* 86 Pac. 796, the complaint was held defective and insufficient to sustain a judgment, because the junior locator failed to allege:

1. That the adverse was filed in the Land Office in the required time.

2. That the patent proceedings were stayed pending the adverse suit.

These are allegations which merely put Plaintiff in postion or status of an adverse claimant, so he could allege the supposed invalidating facts against the senior locator. But the failure of the complaint to allege even those was held fatal, and the complaint insufficient to state a cause of action or sustain a judgment; that the replication containing the missing averments did not cure the complaint; and neither did the decision and judgment cure it.

SECTION 194. Whenever such an attempt is made, there never was and never can be any question but that the party attacking such prior mining location, and seeking to build up a subsequent, conflicting and junior mining location in himself to the same ground, must both allege and prove the facts constituting the claimed invalidity of the prior location. He cannot treat the prior location as an absolute nullity, and proceed, regardless of it, to prove subsequent acts of location of the ground by himself, and to introduce evidence attacking the former location, unless he has first tendered an issue of the facts which he claims and desires to prove as constituting invalidity of the former location.

SECTION 195. If a junior locator would assert that the grant has never in fact attached, he must allege and prove the thing that constitutes the invalidity of it. For:

> "The existence of a mineral location raises the presumption that the location has been properly made and conformed with the law, and that the land covered thereby is mineral in character."
>
> *Walker vs. R. R. Co.*, 24 Land Dec. 172.
>
> "This is a rebuttable presumption, but until overthrown by evidence it fixes the burden (of proof and of allegation) on the party attacking the location."
>
> *Walker vs. R. R. Co.*, 24 Land Dec. 172.

SECTION 196. This is not always a rebuttable presumption, as we shall see later. It may be a conclusive or irrebuttable presumption, for instance, if adverse possession, or the statute of limitations, has run in favor of the location and rights thereunder. Or *actual possession* held and asserted under a prior location may bar a hostile entry for the purpose of making a discovery and initiating a conflicting location. There are other peremptory bars, such as those arising upon certain forms of re-location notices and certificates of re-location. Of these, more anon. But where the prior mining location is a simple *prima facie* location arising upon

valid recorded papers, and location work apparently regular, which is presumptive of title and constructive of possession, the presumption is rebuttable.

Whenever the presumptions attending a mining location are rebuttable they must be in fact rebutted, both by allegation and proof of the rebutting facts, or the facts constituting the alleged invalidity. It is not sufficient merely to say or claim that the prior or first location is bad and the claimant's second or junior location good. The law inquires which claim was first, and then asks the junior location to state wherein the first is bad. Otherwise, it considers the junior bad and the senior location good, and the latter gets the ground.

SECTION 197. With reference to these rebuttable presumptions, when they exist, the law is held to be as follows:

Location certificate as evidence.

"The location certificate is, when recorded, *prima facie* evidence of all the statute requires it to contain, and which are therein sufficiently set forth."

Bismark Min. Co. vs. Min. Co., 95 Pac. 14-18, citing:

O'Reilly vs. Campbell, 116 U. S. 418; 29 L. ed. 669.

Garfield Min. Co. vs. Hammer, 8 Pac. 153 (Mont.).

Id., in 130 U. S. 291; 32 L. ed. 964.

Goldberg vs. Bruschi (Cal.), 81 Pac. 23.

Strepy vs. Clark (Colo.), 5 Pac. 111.

Jantzer vs. Copper Co., 20 Pac. 93-4.

"It will be presumed that a man being a resident of the United States, and who has made a mining location, was a citizen of the United States; that he properly marked the ground; and that he recorded the same within the time the location notice recited these facts."

Jantzen vs. Copper Co., 20 Pac. 93.

"In favor of a purchaser or successor in interest to the original locator, the certificate of location creates a *presumption* of discovery of mineral and a valid location."

Vogel vs. Warsing, 146 Fed. Rep 950, citing:

Harris vs. Min. Co., 8 Fed. 863.

Cheeseman vs. Shreeve, 40 Fed. 791.

Cheeseman vs. Hart, 42 Fed. 98.

SECTION 198. The complaint must fully and particularly set out the precise and definite facts from which the legal conclusion of fraud or invalidity is claimed to arise or result, and if found sufficient, the Plaintiff must then clearly and definitely prove those facts, before he can ask a decree holding for naught the prior conveyance. He cannot by his complaint ignore and treat as a mere nullity the prior conveyance, and then

when it is disclosed by his own or the other's evidence, try to prove it invalid.

Where, ~~however~~, either abandonment or forfeiture are relied upon, the burden of proof rests with the party asserting it.

2 Lindley on Mines, Sec. 644, p. 1600, citing a multitude of cases.

SECTION 199. In a great many cases and under a variety of circumstances this burden upon a junior locator has been applied and explained. In Cheeseman vs. Hart, 42 Fed. 98, which was the case of the owners of an apexing lode to follow it on the dip into the mining ground of another, Judge Phillips held that the claimant of such right on his neighbor's ground, holds the laboring ore throughout upon all the vital issues, and that from him the burden of the real issue never shifts. This rule has been approved in nearly all the mining jurisdictions, including Colorado, Montana, Dakota, Utah, California and New Mexico, by Judges Hallett, Ross and Hawley, and the Circuit Court of Appeals for the Eighth and Ninth Circuits.

See Lindley on Mines, 3d Ed., Sec. 866, pp. 2167-2168.

Buffalo &c Co vs Crump 69 Fed

While the rule is often applied in those cases having to do with the effort of an adjoining locator to trace his lode into his neighbor's ground, it is of very general

application and applies in all cases, and wherever one seeks to build up a right in himself to that which *prima facie* belongs to another.

(G) CHARACTER OF MINING CLAIM, AS REAL ESTATE.

SECTION 200. Indeed, the rule as to the burden devolving upon a junior locator in attacking the senior, is not different from that devolving upon any other second claimant or vendee of the same thing which has been previously granted *prima facie* to another. The same principle runs through the law of pleading and procedure, as to all classes of property. We see this the more readily from the nature and character of mining claims, which are real estate in the highest sense of the term, descendible and vendible as such, and *the recorded* location papers are evidence of a grant from the United States to the locator.

Lavagnino vs. Uhlig, 71 Pac. 1046 (Colo. 2), citing:

1 Lindley on Mines, Sec. 535.

Harris vs. Min. Co., 8 Fed. 863.

Min. Co. vs. Min. Co., 15 Colo. 24; 24 Pac. 920.

McFeters vs. Pierson, 15 Colo. 201; 24 Pac. 1076.

Hughes vs. Devlin, 23 Cal. 506.

"A mining claim is property in the highest sense of the term, which may be bought, sold and conveyed, and will pass by descent. It is not therefore subject to disposal by the Government."

Noyes vs. Mantle, 127 U. S. 353; 32 L. Ed. 168;

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735;

Golden vs. Murphy (Nev.), 103 Pac. 402;

Manuel vs. Wulff, 152 U. S. 505; 38 L. Ed. 532;

Black vs. Min. Co., 163 U. S. 449; 41 L. Ed. 221;

Suessenbach vs. Bank, 5 Dak. 477;

Keeler vs. Trueman, 15 Colo. 143;

O'Connell vs. Mines Co., 131 Fed. 106;

Mt. Rosa Min. Co. vs. Palmer, 26 Colo. 56; citing

Min. Co. vs. Fremont, 7 Cal. 317;

Hughes vs. Devlin, 23 Cal. 502;

Merritt vs. Judd, 14 Cal. 60;

Min. Co. vs. Min. Co., 15 Colo. 29; 24 Pac. 920;

Forbes vs. Gracey, 94 U. S. 762; 24 L. Ed. 313.

SECTION 201.

He may hold and enjoy perpetually without applying for a patent; and the exclusive right of possession and enjoyment granted him forbids any trespass by others; for that exclusive right of posession is much his property as is the vein, lode or mineral deposit.

Gillis vs. Downey, 85 Fed. 483;
Clipper Min. Co. vs. Ely Min. Co., 194 U. S. 226; 48 L. Ed. 944.

Having once granted a thing, there is no room for a like grant to another of the same thing.

"A certificate of location when recorded, is a statutory writing affecting realty, being in the states or localities where it is required, the basis of the miner's 'right of exclusive possession' of his mining location granted by the laws of Congress. It is the first muniment and the genesis of the locator's title, upon the record of which proceedings for patent are based."

Lindley on Mines (3rd Ed.), Sec. 379, page 892.

SECTION 202.

And in a possessory action proof of possession

of a mining claim is always prima facie evidence of title.

It has been held that if the plaintiff is unable to prove a valid location in accordance with the mining laws in force, yet if he show actual possession under color of title at the time defendant entered, he may recover in ejectment.

Lebanon Min. Co. vs. Min. Co., 6 Colo. 371-2.

SECTION 203. And as we said, the position of the parties and nature of the issues between a junior locator seeking to overthrow a senior location, i. e. a former grant of the same thing to another, is the same, and the same rules regulate the measure of allegation and proof, as applies to a subsequent purchaser or encumbrancer of property in general who would invalidate a prima facie valid prior conveyance of the same thing. He cannot assume the invalidity of the prior grant or conveyance, and go take possession of the thing granted, ignoring its owner or possessor under the previous conveyance. But he must fully and particularly set out and allege in his complaint, the precise and definite facts from which he claims the conclusion of invalidity arises, and from which the Court may be authorized to declare the first conveyance or grant invalid. Nor can he escape pleading the supposed invalidating facts by reciting that the former conveyance is bad, or void, or fraudulent, or any similar phraseology. That is merely to characterize the transaction, which is

nothing in pleading, raises no issue of invalidity, and will not support a judgment if rendered.

6 Enc. U. S. Sup.Co urt Reps. 522 n. 14;
Knox vs. Smith, 4 How. 208; 11 L. Ed. 983;
6 Enc. U. S. Sup. Ct. Rep., 434 n. 43, 44, and 435 n. 45, 436 n. 48.

Nor is invalidity ever presumed, but must be definitely alleged and proved.

6 Enc. U. S. Sup. Ct. Rep. 522, n. 43;
Tucker vs. Moreland, 10 Pet. 58, 78; 9 L. Ed. 345;
Schrever vs. Scott, 134 U. S. 405, 416; 33 L. Ed. 955.

SECTION 204.

The discovery and location of a claim in pursuance of that law is equivalent to a contract of sale and purchase where the purchaser is let into possession, and becomes entitled to a deed from the vendor upon the payment of the purchase price. The locator becomes entitled to the exclusive possession and enjoyment of the claim located, and upon the payment of the purchase price—that is, upon the payment of the required amount per acre, and the necessary amount of work upon the claim—he becomes entitled to a deed—a patent, which is the government deed—to the ground within the boun-

daries of his location. And, if the contract of sale and purchase is to be defeated because of non-compliance with its terms, the facts showing such non-compliance must be alleged and proved. The property does not become subject to sale by the government to any other purchaser until the title or right already granted has become forfeited, and this forfeiture must be established by allegation and proof.

The judgment is affirmed, with costs.

Renshaw vs. Switzer, 13 Pac. 127-8.

The burden of proving the fraud or invalidity rests on the attacking party.

6. U. S. Sup. Ct. Rep. 522, n. 44.

And in general as to pleading definite and precise fact from which fraud or invalidity is claimed to arise or result:

Jain vs. Giffin, 32 Pac. 80;
Bennett vs. Reef, 27 Pac. 253;
Thomas vs. Mackay, 3 Colo. 390, 392-3;
Wilson vs. Sullivan, 53 Pac. 996;
Bliss Code Pl. Sec. 211 (2nd Ed.);
Seeleman vs. Hoagland, 34 Pac. 995;
20 Cyc. 734, note 52 and cases; 735-6, note 53; 736, note 54, and cases.

If a party desires to subject property held by a vendee under apparently valid indicacia of owner-

ship or muniment of title he must plead as well as prove the facts that citiate such title."

Seeleman vs. Hoagland, 34 Pac. 995.

To say or assume that a transaction, conveyance, or sale is invalid or fraudulent, without setting out the facts which make it so, is insufficient to admit proof of invalidity, or any invalidating facts, will not sustain a decree, even though proof of invalidity be admitted.

Leasure vs. Forquer, 41 Pac. 665;
Meeker vs. Harris, 19 Calif. 279-290;
Cohn vs. Goldman, 76 N. Y. 284;
Lackner vs. Sawyer, 98 N. W. 49; citing:
34 Pac. 64; 33 Pac. 1038;
30 N. E. 105; 9 Enc. Pl. & Pr. 686-7.

SECTION 205. In regard to mining claims, the United States, as grantor, cannot, to be sure, be guilty of any fraud in disposing of the ground to the first locator, but the grantee or prior locator may, if he fails to comply with the conditions of the grant; i. e. with the conditions of a valid mining location. He may be guilty of a *quasi* fraud or wrong not only upon the Government or grantor, but upon subsequent locators, if he attempts to hold the ground without due compliance with the conditions of the grant. And his title and right to possession is made voidable by allegation and proof of the facts constituting such non-compliance. in the class of cases we now refer to.

And that this is the view of the Courts in like cases, we have shown under Secs. 191-198 of this Brief.

SECTION 206. In the following cases, the junior locator having neglected this point, when he got into Court and it developed from the evidence that there was on the ground a prima facie mining location, or some evidence of a prior mining location at the time of the junior location the junior was sent out of Court under non-suit.

McWilliams vs. Winslow, 34 Colo. 341; 82 Pac. 538;

Moffatt vs. Blue River G. E. Co., 33 Colo. 142; 80 Pac. 139;

Logan vs. Neill (Mont.), 96 Pac. 343;

Kirk vs. Meldrum, 28 Colo. 453; 65 Pac. 633-5;

Clipper Min. Co. vs. Ely Min. Co., 29 Colo. 377;

Laland vs. McDonald, 68 Pac. 286; 13 Pac. 347.

SECTION 207. *Trespass in locating on Senior Ground.* The Plaintiffs below and their grantors were therefore trespassers in attempting to locate the Davis claim in defiance of the Salt Lake No. 3 lode location which held the ground. The latter were preserved by the presumptions that attend all prima facie mining locations, in the absence of anything alleged against them and

which like the presumptions of innocence which protects every citizen in his rights to life and liberty, reaches down and also protects his property, until something affecting its integrity is alleged and proved against him. The

Insert

But in the face of the irrebuttable presumptions arising from limitations of law, actual possession of ground by defendant, relocation by plaintiffs, etc. as shown herein, it is not very clear how either allegation or proof of any supposedly invalidating facts would avail them.

220-230; 48 L. Ed. 944;

Cowell vs Lammers, 21 Fed. 200.

Belk vs Meagher 104 U.S. 279

Reavis vs Fianza 215 U.S. 16

See 200-ante, 281-300 post.

(I) ADDITIONAL ASSIGNMENTS.

SECTION 208. *Peremptory Instruction.* In view of the foregoing, the Court ought to have granted our request for a peremptory instruction to the jury to find for the Defendant below. There was nothing for the jury to decide. There was an unquestioned, sufficient, prima facie lode mining location of the Salt Lake No. 3. It was prior in time to the Guy Davis location. Nothing was alleged against it. Therefore nothing could be said against it in the evidence, vedicts or judgment. There

was no proposition for the jury to investigate upon the evidence. Under these conditions, it was error to submit a question of fact to the jury. It was wholly a question of law for the Court, and the law was with us. We requested such instruction as set out in our Assignment of *Error* No. 42 (Sec. 674, post), heretofore quoted. It was refused.

SECTION 209. **Assignment No. 49 (Sec. 681, post.)** But if the jury had to be instructed, they should have been in structed correctly. The instruction contained in our Assignment No. 49 correctly sets forth the law upon the facts within the issues. It was refused. (Sec. 681, post.)

SECTION 210. **Assignment No. 50 (Sec. 682, post.)** But the Court went further, and the jury were mis-instructed. It instructed them in a way to foreclose inquiry on their part, that the locators of the Guy Davis location *had complied with the law* in locating their claim, and that they might find under the instructions of the Court that the Salt Lake No. 3 was not properly located. This was error. (Sec. 682, post.)

SECTION 211. **Assignment No. 61 (Sec. 683, post.)** And we assign error that the judgment is against the law for the same reason, and because the evidence is insufficient to justify the same. (Sec. 693, post.)

(J) RELIEF ASKED.

SECTION 212. *Relief Asked.* We ask the Court to hold and adjudge

1. That by the undisputed facts testified and proven the Plaintiff in error has absolute title and right of possession and patent for the Salt Lake No. 2 Lode mining claim;

2. That at any rate Plaintiff in error has a prima facie title and prima facie valid mining lode locations of said lode claims, which are absolute as against the defendants in error, for the reason that their complaint does not set up or allege any ground of invalidity in fact in said locations, and because the evidence shows affirmatively and without dispute that the lode claims are prior in time and right to the placer locations asserted by the defendants in error.

CHAPTER V.

THE PLACER DEPOSITS.

Section

(A) Assignments of Error 213

(B) Owner of lode claims owns placer deposits and all valuable substances upon or under the surface of the ground..... 216

(C) The Testimony 221

(D) Relief 226

(A) Assignments of Error.

SECTION 213. We assign for error under No. 41, that the evidence is insufficient to support or justify the judgment or verdicts herein, because

Assignment No. 41 (Sec. 673, post.)

24. The evidence shows affirmatively and without conflict that the Plaintiffs never made a discovery within the ground claimed under the alleged Guy Davis relocation, but that they attempted to appropriate merely, that which they knew was there and had been already discovered and exposed by the Defendant.

25. The evidence shows without conflict that all the placer values in the ground claimed to have been relocated upon, were within the Salt Lake No. 3 lode mining claim, and belongs to the Defendant as owner of said lode claim, and were not in law

subject to entry, location, discovery or appropriation by the Plaintiffs, or any one else.

26. The evidence shows that the said relocators, Guy Davis and Noah Faubert, entered upon the ground as trespassers merely, without shadow of legal right or authority, and that all their alleged acts of discovery and relocation are void, and no title or right of possession of the ground was obtained thereby.

SECTION 214.

Assignment No. 60 (Sec. 692, post.)

1. That the general and special verdicts, and each thereof, are contrary to and against the law, in each and every one of the particulars wherein it has been above specified, under Assignment No. 41 that the evidence is insufficient to support, sustain or justify the verdicts.

SECTION 215.

Assignment No. 61 (Sec. 693, post.)

2. That the judgment is against the law, because the evidence herein is insufficient to support, sustain or justify the same, in each of the particulars herein specified under assignment No. 41.

(B) OWNER OF LODE CLAIMS OWNS PLACER DEPOSITS AND ALL VALUABLE SUBSTANCES IN OR UNDER THE SURFACE OF HIS CLAIM.

SECTION 216. The placer deposits exist and were found (first by Plaintiff in Error) within the exterior lines of his lode claims, the Midas, Evening Star and Salt Lake No. 3. They had knowledge thereof. And it was within the Salt Lake No. 3 lode claim, that the claimants of the Davis Lode location entered and pretended to make a ~~placer~~ mineral discovery. See map at Sec. 8 of this brief, which gives the Davis discovery point on the south central part of the Salt Lake No. 3 ground, at the point shown by shaft No. 8. And the same map gives the outlines of the Davis location as claimed by them overlapping and conflicting with practically the entire Salt Lake No. 3 ground by an adoption of the corners and exterior boundary lines of the Salt Lake No. 3.

SECTION 217. But Plaintiff in Error and his grantors had already acquired title to the ground prior to their entry and pretended discovery, under U. S. Rev. Stat. Secs. 2320 and 2332 respectively, as shown in the two preceding chapters hereof. The result was that the ground was segregated thereby from the public domain and was no longer subject to mineral discovery and location under any of the public land laws, nor under Sec. 2333 relating to placers. By their lode locations, perfected under both or either of said statutes, Plaintiff in

Error and his grantors became vested with the exclusive title and right of possession and enjoyment not only of all lodes and veins, but all valuable deposits substances and growth of every nature and description upon and below the surface of the ground.

SECTION 218. The nature and character of a mining claim under the mining laws as having all the qualities of real estate has been shown by citations in previous Secs. 200-204.

"Within the lines of each location the *owner* shall be regarded as having full right to *all that may be found*, until some one can show a clear title to it as a part of some vein or lode having its top or apex in other territory."

Min. Co. vs. Min. Co., 83 Pac. 648-667, col. 2.

"Every locator within his own lines shall be regarded as the owner of all valuable deposits, until some one shows by a preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere.

Min. Co. vs. Min. Co., 83 Pac. 648, 667-8, citing cases.

"Lode mining claims are property, and the owner may recover for the value of timber cut and removed from the claims without his consent."

McFeters vs. Pierson, 15 Colo., 201, 24 Pac.

1076, citing Smelting Co. vs. Kemp, 104 U. S. 648; 26 L. Ed. 875.

"Locators of lode claims are the owners thereof antecedent to the entry for Government patent."

Id., citing: Rev. St. U. S. Sec. 2319 and seq.

"A valid and subsisting location of mineral land made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the present and exclusive possession of the lands located."

Gwillim vs. Donnellan, 115 U. S. 49, 29 L. Ed. 348.

McFeters vs. Pierson, 15 Colo. 201-4, 24 Pac. 1076;

Forbes vs. Gracey, 94 U. S. 767, 24 L. Ed. 313;

Belk vs. Meagher, 104 U. S. 283, 26 L. Ed. 735.

"The locator is the owner for all practical purposes, both before and after the patent, and is entitled to the exclusive enjoyment against every one, including the United States itself.

McFeters vs. Pierson, 15 Colo. 201-4, 24 Pac. 1076.

"The statute (Sec. 2319) declares "*the lands*" in which valuable mineral deposits are found to be

open to occupation and purchase, and Sec. 2325 provides that "a patent for *any lands*, etc."

These provisions tend to indicate that the patent when issued is a grant of the land with all the rights incident to common law ownership.

The reason for specifying "veins, lodes and ledges" is for defining what is granted in addition to the land, viz: the right to pursue the vein if it depart from the perdendicular, etc."

Min. & Mill. Co. vs. Min. Co., 113 Fed. 900-2.

The holder of a government patent or certificate has, I think, the just and legal right to say, "Hands off of any and everything within my surface lines extending vertically downward." The mere possessor of a mining claim under license from the government would have that right.

While the real object of grants of the nature of those under consideration is the mineral, the statute makes provision, as stated in Duggan vs. Davey, for the disposition of "lands valuable for mineral." "It is the 'lands' in which mineral deposits are found which are 'open to purchase.' It is 'land' claimed and located for valuable mineral deposits which is the subject of application for patent, and where patent of the United States issues it is for the 'land' at so much per acre.

Doe vs. Waterloo Min. Co. 54 Fed. 935-7.

SECTION 219. In other words, there is no exception or reservation carved out of the entire estate granted, other than such as is required and specified in by the words of the U. S. statute under which the location and the grant in question is made. The only exceptions or reservations contained in the Federal Statutes, are the following:

U. S. Sec. 2329 and 2333 (for placer locations) excepts out of the grant all lodes or veins the existence of which is known, unless specially applied and paid for at double the rate per acre for the lode or vein area that is charged for the balance of the surface ground within the placer.

Sec. 2320 (for lode claims) makes no exception of placer deposits therein, but does except all lodes or veins therein having their top or apex within the surface lines of another mining location.

The railroad, townsite and agricultural entry statutes, each and all excepts out of them all known lodes or veins, containing valuable mineral deposits therein specified.

And by comparison of lode claims with placers and some of the other forms of entry, it is seen lode claim lands are more highly valued. Placer ground is directed to be sold for $2.50 per acre, not to include the more valuable lode if known to exist therein, unless applied and paid for at $5 an acre; but in lode claims under Sec.

2320 and 2332, the whole is paid for at $5 per acre, and consequently includes all forms of deposits and substances which are worth less than lodes in the statutory schedule of prices.

SECTION 220. On the other hand, under the placer statute, Secs. 2329-2333, the same provisions of law are made applicable, in order to initiate a placer claim as is required for a lode claim. A mineral discovery is required to support such location, and without such discovery upon unappropriated, vacant and unoccupied public lands of the United States no title or right of possession is initiated.

Steele vs. Tanana Mines Co., 148 Fed. 678.

If the attempted location or discovery is made upon ground embraced within the existing location of another, then the whole location falls and is void, because the law authorizes no such thing to be done. It is fatal to the location in the same manner and to the same extent that it is fatal to a lode location under the same circumstances.

(C) TESTIMONY.

SECTION 221. Not only was their pretended location and pretended discovery of placer mineral within the Salt Lake No. 3 lode claim void and illegal for the reasons given, but they did not in fact "discover" the placer deposits at all. These deposits had already been

discovered by Plaintiff in error on behalf of his grantor, some three months before the Davis lode claim was attempted to be made or initiated at all. The account of this is detailed by Mr. Ralph in his testimony at record pages 993 to 999.

Rec. Page

993 Under my direction a shaft was put down vertically 33 feet, then went off on an incline about 53 or 55 feet altogether, at the point shown as "D" on the map,
994 Defendant's Exhibit No. 5, and "26" on map, Plaintiff's Exhibit "A." I sunk that for two purposes. I was sinking one shaft up on the S. W. corner of the Salt Lake No. 3, and one on the N. W. corner of the Midas, going down for placer; and I came to the conclusion that after the purpose had been served for which I commenced it, that work to better economic importance and value could be secured by going down to the lowest end of the property; so I went down to that point "D" the very lowest point of the Glasgow and Western property.

That was in May or June, 1913, long before there was any jumping of claims.

(Reports purpose of the shaft as above, and says that by drifting north from the shaft "D" in the Can-
995 yon on the pay channel at bed rock, it would not only develop the placer but lay bare any lodes that might be exposed in its course.)

Rec. Page

996 The shaft went down 33 feet, there encountered bed rock or western rim of the Canyon, and thence dipped east with the bed rock to get to the channel.

997 The cost of that work was $400 to $500.

In sinking that shaft I discovered placer gold.

998 When the incline, in going down, came to that point where the bed rock started going up, rising again toward the east, naturally the lowest point or depression was the channel, and in the channel there was very fine values.

999 We took out about 20 or 30 pounds of the dirt, and out of that washed out one-third of an ounce, which is worth $6 in money values.

SECTION 221a. Knowledge, etc. The work of locating the Davis claim for the locators, Davis and Faubert, was done by their witness, D. S. Van Orman (Record p. 241), who testified that he located it for himself, Davis and Faubert, but he was mistaken as to this, as only Davis and Faubert's name appeared on the notice and certificate as locators, and Van Orman signed as a witness only (record p. 236-7). This point is immaterial at present, for he was there doing the work as agent for the locators, and he was testifying for them.

He testified that,

241 —when he made the Guy Davis location he intended to take all the property within the boundaries of the

Rec. Page

231 claim; that among other improvements he found on the ground at the time were some late developments that had been done by the Glasgow-Western; a mill partly on the Salt Lake No. 3; an old well, excava-
233 tion for a cellar, etc.; and roadways, shaft, etc.

244 At the time I located the Guy Davis claim, I knew there were other claimants to the Salt Lake No. 3 which I covered with my location, yes.

(See also Plaintiff's map Exhibit A showing duplication of boundaries and corners, (Sec. 8 ante, of Salt Lake No. 3 by the Davis location.)

397-8 At the time I made the Davis location I knew someone was living in the houses on the Salt Lake No. 3. Don't remember who he was. He was an occupant of one of the houses there. He was the man that reprsented the Glasgow-Western; and I believe there was a presumption to the effect that they at that time were the owners of the Salt Lake No. 3, Midas and Evening Star.

246 The point on the map, Exhibit A (Sec. 8 ante), where I did the representation or discovery work on the Davis location was here about 200 feet from the end line, at the little shaft marked "8." The discovery work was done about 20 or 30 feet from the discovery monument. That is where I posted my notice of discovery.

Rec. Page

249 That was the discovery work ~~on~~ in the claim, yes.

231 There were two shafts sunk on the Salt Lake No. 3 at that time 8 or 9 feet deep in placer or gravel.

Note: (These are evidently the placer shafts spoken of by Mr. Ralph in preceding section, that he sank in summer of 1913, just before he sank the deep one on Evening Star at "D" or "26").

226-7 The Davis location was attempted to be made on Sept. 5, 1913.

SECTION 222. The record shows Mr. Ralph called the attention of Christensen and Dahl, the owners, of the adjoining ground down the Canyon just before sinking his shaft 55 feet deep at point "D" or "26" on map, so there might be no boundary dispute. Their witness Healey, who came in later, went to work for Christensen & Dahl as a placer miner, and undoubtedly they had full knowledge of the strike of rich placer in the shaft soon after it occurred. It is evident that is what brought them into the Canyon so soon after. Such rich "*diggings*" could not escape general notoriety in the narrow Canyon where it occurred, and for many miles around. Everybody was awake to it. That is what brought on the *rush*, the trespasses, and the injunctions of which they testified.

Healey testified for them that:

I knew prior to my location of the Homestake (Sept. 8, 1913) that Mr. Ralph had sank a shaft

which is designated on the map as No. 26, to a depth of about 33 feet on the west side of the Evening Star, yes.

Record p. 298-9.

SECTION 223. They make no claim to having discovered or located anything on the ground until after Mr. Ralph's placer diggings in the corners of Salt Lake No. 3 and Midas in the wash of the Canyon, and until the deep shaft D or "26" on the Evening Star. The latter with the immense dump of material at the mouth of the shaft, was evidence which they could not ignore, and of which a most casual inspection of the ground, would give them notice of the rich deposits at the bottom or bed rock.

"No one can be heard to say that he had examined that ground in order to ascertain if it were suitable for placer purposes, and in such examination had not discovered the existence of this tunnel" —or (shaft, we might put it).

Iron S. M. Co. vs. Mike & Starr Min. Co.,
143 U. S. 403; 36 L. Ed 204.

SECTION 224. Neither could they after such casual inspection deny or fail to take notice of the other improvements on the ground, in way of openings, roadways and excavations, and the *boundaries* of the claim which had always and were then up and in their original positions on the ground, warning all comers to trespass at

peril. Nor did they seek to deny, but testified and admitted such boundaries, and all annual labor.

Ray, record p. 258;

Phillips, record p. 320-324-325;

Their Counsel's admissions in Court, record p. 977-8;

The Court's instructions, record p. 1225-6.

But it is really not *knowledge* but date of the respective locations which decides this matter. And there is no dispute or conflict as to the dates. Salt Lake No. 3 on Feb. 2, 1897; Davis claim on Sept. 5, 1913, over 16 years later.

SECTION 225. But it is very evident that the relocators never intended at the time to make a placer location at all. Their location work (shaft No. 8 on Salt Lake No. 3) was away from the placer deposits in the wash of the Canyon, as will be seen by their map Exhibit A. They located it as the Davis Lode claim, as a *relocation* of the Salt Lake No. 3 for recited failure to comply with the law. Finding they could not begin to sustain a charge of forfeiture for failure to do the annual labor, they tried to change it to a placer location in the vain hope to improve their position on the record. Not until Oct. 1, 1913, nearly 30 days later, did they attempt to do placer work in the Canyon (*record p.* 251-2), and by or before Dec. 1, 1913, they were shut out by the injunctions.

(D) RELIEF ASKED.

SECTION 226. We ask the Court to hold that the placer deposits in controvery herein are the property of the plaintiff in error, because they exist within the exterior side and end lines of the Salt Lake No. 3 claim projected downward; that the same being private premises were not subject to entry, discovery or location by plaintiffs below under the mining laws, that their entry and attempted location was a trespass and no rights were acquired thereby.

That their adverse claim to said premises be rejected, and Plaintiff in error adjudged to have the title and right of possession, purchase and patent.

CHAPTER VI.

RESUME.

EFFECT OF NO TITLE OR RIGHT OF ACTION IN THE PLAINTIFFS BELOW, AS TO THEIR STATUS IN THE CASE.

SECTION 227. *Result of Previous Chapters.* Under Chapter II we have seen that none of the Defendants in Error, Plaintiffs below have any title or interest in the subject matter of the action, or in the alleged Davis lode claim, nor any rights of action herein against the Plaintiff in Error, Defendant below.

Under Chapter III, Plaintiff in Error has a perfect title to the ground under his Salt Lake No. 3 lode location, by adverse possession and limitations under U. S. Rev. Stat. Sec. 2332, barring subsequent locations as long as assessment work is kept up, which is admitted.

Under Chapter IV, Plaintiff in Error has a perfect *prima facie* location under the Salt Lake No. 3, by location, discovery, etc., under U. S. Rev. Sec. 2320, which in the absence of anything alleged against it, as there is not in the complaint, is perfect and unassailable in this proceeding.

Under their own evidence, the date of the Davis relocation is junior and subsequent in time to the Salt Lake No. 3, and therefore invalid and of no effect, because it necessitated a trespass upon the mining claims of another, and was not upon the public domain.

They have therefore no further right to be heard in this case.

SECTION 228.

"Where Plaintiff upon the record has no right or title to the conflicting mining locations in support of which the adverse was filed and the adverse suit begun, he is a "stranger to the title" to the premises in dispute. A failure to establish title in defendant can in no way benefit him or validate his alleged title to the conflicting location."

Lavagnino vs. Uhlig (Utah), 71 Pac. 1046-9.

"The Plaintiffs not being in possession at the time of defendant's entry, they could not recover except upon a showing of title in themselves by a preponderance of the evidence, without regard to what the Defendant had done in the way of exploration and discovery."

Ferris vs. McNally, 121 Pac. 893.

"Where the claims of title to a mining claim set up by Plaintiffs appear by the record to be void in their inception, the plaintiffs have no standing in court to question the validity of the defendant's title."

Omar vs. Soper, 18 Pac. 443.

To the same effect is:

Moffat vs. Blue River G. E. Co., 33 Colo. 148; 80 Pac. 139.

McMillen vs. Ferrum Min. Co., 32 Colo. 38; 74 Pac. 761;

Kirk vs. Meldrum, 28 Colo. 4544; 65 Pac. 761.

~~Kirk vs. Meldrum, 28 Colo. 454; 65 Pac. 633.~~

McWilliams vs. Winslow, 34 Colo. 341-4; 82 Pac. 538;

Laland vs. McDonald, 13 Pac. 347.

"Where in a suit in support of an adverse mining location, Plaintiff was not entitled to a judgment which he recovered, on the facts existing at the date of the filing of his adverse, Defendants were not precluded from objecting to such judgment by the fact that the jury found there had been no discovery by defendants on their claim on which their application for a patent was based.

Healey et al. vs. Rupp, 86 Pac. 1015-1016.

CHAPTER VII.

INSUFFICIENCY OF THE COMPLAINT.

Section.

(A) Assignments of Error, and Particulars of Insufficiency 229
(B) The Complaint set out..... 234
(C) Failure to Allege Ground was Vacant, Unoccupied or Unappropriated..... 235
(D) Failure to allege Filing Adverse by Plaintiffs 237
(E) Failure to Allege Ouster or Detention..... 238
(F) Nature of Adverse Suit, at Law or Equity.... 249
(G) Relief Asked 271

(A) ASSIGNMENTS OF ERROR, AND PARTICULARS OF INSUFICIENCY.

SECTION 229. If any one of the propositions contained in the foregoing chapters are well taken, it, of course, puts an end to the contentions of defendants in error, and necessitates a reversal of the judgment that was entered below against Plaintiff in error, and he may proceed as he may be advised in the matter of his application for patent, either in Court or before the Land Office.

It may be that we should no longer prolong this brief, and the discussion of the various additional assignments. But since the Court is privileged to suspend its labor whenever satisfied upon any question that is

pivotal and decisive of the case, and need not prolong its own labors unnecessarily, the writer will go ahead and see what there is to the contentions of our opponents, notwithstanding they are without interest in the subject matter or the outcome of the case.

SECTION 230. *The Complaint Insufficient.* And first, as to their complaint, we assert that it does not state facts sufficient to constitute a cause of action, or to support a judgment, but is radically deficient in that behalf.

Assignment No. 1 (Sec. 630, post.)

"The Court erred in permitting the introduction of any evidence by the Plaintiffs, because their complaint herein does not state facts sufficient to constitute a cause of action. Thus:

(a) The complaint does not allege that at the time of making Plaintiffs' Guy Davis location, the ground included therein was either open or vacant, unoccupied, unappropriated, or public mineral lands of the United States.

(b) The complaint does not and can not in this action put in issue the mineral or non-mineral character of the said ground.

(c) The complaint does not allege any ouster or detention of the said ground, wrongful or otherwise, by the Defendant from the Plaintiff; nor any wrongful detention at the time suit was begun.

(d) Because the complaint alleged no adverse filed in the U. S. Land Office having jurisdiction of said lands, by the Plaintiffs as required by law.

(e) The complaint alleges no facts showing a valid location by the Plaintiffs or their grantors, nor any invalidity in Defendant's prior location, the Salt Lake No. 3.

Before any evidence was introduced, the Defendant at the trial objected to the introduction of any evidence by the Plaintiffs because of such insufficiency, and the objection was overruled. To which ruling Defendant excepted, and now assigns the same as error.

Assignment No. 28 (Sec. 655, post.)

SECTION 231. Upon the conclusion of Plaintiffs' evidence in chief, on the trial of this action, Defendant moved the Court for an order of non-suit, on the following grounds to-wit:

1. That the complaint herein does not state facts sufficient to constitute a cause of action, or for an adverse; and fails to allege that the ground on which Plaintiffs filed the Guy Davis location, was at the time thereof vacant, unoccupied or unappropriated public land of the United States; and fails to allege an adverse filed by Plaintiffs in the Land Office.

Assignment No. 61 (Sec. 693, post.)

SECTION 232.

1. That the judgment is against the law because the complaint herein does not state facts sufficient to constitute a cause of action, said complaint being insufficient in each of the particulars hereinbefore specified under Assignment No. 1.

SECTION 233. In this connection, we repeat what we have said in Secs. 180a, 189-206 of this brief. Where there is no ground of invalidity alleged against a mining claim, or fact from which the legal conclusion of invalidity flows, a mining claim is upheld by a presumptions of law, when a prima facie location is shown. As no ground of invalidity was alleged against the Salt Lake No. 3 lode location, the complaint cannot be said to raise that issue. But does it raise or tender *any issue?* That is the present question.

(B) THE COMPLAINT.

SECTION 234. The complaint reads as follows:

Plaintiffs complaint of Defendants, and for cause of action against said Defendants allege:

I.

That ever since the .... day of September, 1913, Plaintiffs and their predecessors in interest were the owners of and in the actual possession

and occupation of the Guy Davis Placer Mining Claim 900 feet in length by 600 feet in width, said claim being situate in the Battle Mountain Mining District, County of Lander, State of Nevada, and Plaintiffs and their predecessors in interest ever since have been and now are the owners of and entitled to the possession of said mining claim.

II.

That Plaintiffs are the owners of and entitled to the possession of said Guy Davis Placer Mining Claim by virtue of a full compliance with the local laws, rules and customs of miners in said mining district, the laws of the United States and of the State of Nevada relative to mining claims, and by actual prior possession, location and discovery thereof by these plaintiffs, their grantors and predecessors in interest.

III.

That on or about the 1st day of August, 1914, the defendant wrongfully and without right entered certain portions of said Guy Davis Placer Mining Claim, and on or about said day said defendant filed in the United States Land Office at Elko, Nevada, diagram and filed notes of the Salt Lake No. 3 lode and also the John John and other lodes, and filed therewith an application for patent of the United States for said Salt Lake No. 3 lode, said

application being designated as M. A. No. 01544, Min. Sur. No. 4175, and caused the Register of said Land Office to give notice of said application for patent by publication as required by law in the Battle Mountain Scout, a newspaper published in said mining district at Battle Mountain, Nevada, the first publication thereof being made on the 1st day of August, 1914, and in said application said defendant did apply for patent of all of said Salt Lake No. 3 lode, and more particularly described as follows:

(Here follows the quoted field notes of the Salt Lake No. 3 claim, not necessary to be repeated here).

That by said application for patent and by said wrongful entry aforesaid, Defendant wrongfully and without right entered said Guy Davis Placer, and practically all of that part of the Guy Davis Placer, which is intersected by the exterior lines of said Sur. No. 4175, as shown by plat marked "Exhibit B," filed on the 24th day of September, 1914, in the Land Office of the United States at Elko, Nevada, with the adverse claim of Defendant against the entry of said Min. Sur. No. 4175, Mineral Application No. 01544, for patent, said ground so intersected being described as follows:

(Here follows the field notes of the conflicts between

the lode claims and the alleged Guy Davis claim, not necessary to be set out).

That said adverse claim was filed in said Land Office within the period of sixty days of notice of application for patent on said Salt Lake No. 3 lode, Sur. No. 4175 M. A. No. 01544, and this suit is commenced and brought before the expiration of the period of thirty days after the filing of said adverse claim.

That this suit is brought in support of said adverse claim, and that plaintiffs have necessarily disbursed, expended and paid out the sum of $250 for plats, abstracts and copies of papers filed in said land office with their said adverse claim, and reasonable counsel fees, to-wit, $250 for the expense of preparing their said adverse claim.

WHEREFORE, Plaintiffs pray judgment against the defendant:

1. For the recovery of possession of said Guy Davis placer claim and for a decree of this Court they are the owners in the possession of and entitled to the possession of said Guy Davis placer claim.

2. For the sum of $500.00 damages:

3. For the sum of $500.00 expended in the preparation of said adverse claim.

GEO. B. THATCHER,
WM. FORMAN,
(Verified.) HARRY C. PRICE,
Attorneys for Plaintiffs.

(C) FAILURE TO ALLEGE THAT GROUND WAS VACANT, UNOCCUPIED AND UNAPPROPRIATED.

SECTION 235. "The complaint must allege that the ground was vacant and unoccupied mineral lands of the United States when Plaintiffs filed their locations on it."

Keppler vs. Becker, 80 Pac. 334.

This rule of pleading was complied with in the complaints in

Muldrick vs. Brown, 61 Pac. 428;
Phillips vs. Smith, 95 Pac. 91.

The cases cited in Sec. 206 hereof hold that the Plaintiffs must show that the ground claimed by them was vacant, unoccupied and unappropriated public land at the time of their locations, or be non-suited. If necessary to prove it, it must be alleged for the allegata and probata must agree, and either one without the other is insufficient. This is a primary rule of pleading.

For additional citations showing the insufficiency of the complaint, see Secs. 189 to 206 ante.

SECTION 236. But it may be urged, that the complaint says their Guy Davis claim was located in compliance with the mining laws, rules and regulations. This does not help. It is merely a conclusion of law, and states no facts.

McGowan vs McKay 40 Pac. 602

Anthony vs. Jillson, 23 Pac. 419, 420; citing

Moyes vs. Griffith, 33 Calif. 556;

Covenny vs. Hale, 49 Calif. 552;

Thorne vs. Hammond, 46 Calif. 534;

Doherty vs. Min. Co., 50 Calif. 187.

"A clause in the findings that the locator had fully complied with the laws and statutes, etc., with reference to placer mining claims, amounts merely to a legal proposition and does not amount to findings of fact."

"The complaint should state facts showing that Plaintiff is entitled to the possession of the premises in question, not only as against the Defendant, but as against the United States by virtue of a compliance with the requirements of the Mineral Act, and the state and local laws with reference to the location of mining claims."

27 Cyc., 610 notes 53-55, citing cases;

Morrison vs. Regan, 67 Pac. 955.

"If necessary to prove these facts it is necessary to allege them. The complaint contains no such allegation and is fatally defective."

Cronin vs. Min. Co., 32 Pac. 204-5, Col. 1.

"It is not only insufficient to admit proofs, but is insufficient to sustain a judgment."

Id., p. 205, and citing cases in 19 Pac. 310 and 13 Pac. 347.

(D) FAILURE TO ALLEGE FILING ADVERSE BY PLAINTIFFS.

SECTION 237. *Failure to File an Adverse.* The complaint in both cases were fatally defective in failing to allege that the Plaintiffs had filed an adverse in the U. S. Land Office. It alleged that the Defendant had filed one. To what purpose, no one knows. On the trial they asked to amend this, to make it read Plaintiffs instead of Defendant, in one of these cases. In the other they did not ask to amend, and the complaint remains defective in both cases as it was never amended in either case

Record pp. 15-20 and 440-2.

The complaint remains fatally defective by reason thereof.

Thornton vs. Kaufman, 88 Pac. 796.

(E) FAILURE TO ALLEGE OUSTER OR DETENTION.

SECTION 238. This action was begun and prosecuted as an action at law, and was tried to a jury which was regularly empanelled, and there was verdict and judgment in common law form. The complaint sounds in tort, and asks a judgment for possession and damages. (See Sec. 224 hereof. Record page 15-20.) While the Court's judgment was that the Plaintiffs have and recover from Defendant the Guy Davis Placer, describing it. (Record page 20-26.)

The action therefore is in the nature of ejectment for possession and damages.

SECTION 239. Ejectment, or any action of that nature, to recover possession of real estate, is applicable where Plaintiff is wrongfully kept out of possession by Defendant, and the gist of it is Defendant's wrong in dispossessing and detaining from Plaintiff his real property. In its origin and nature the action is strictly *ex delictu.*

> "Where the right set out by Plaintiff is title to real estate and the remedy sought is its possession and enjoyment, the remedy sought is at law."
>
> Holland vs. Challon, 110 U. S. 15;
>
> Whitehead vs. Shattuck, 138 U. S. 146.
>
> "Where an action is simply recovery of possession of specific real or personal property, the action is at law. An action for the recovery of real

estate, including damages for withholding it has always been of this class."

Id.

"In the Courts of the United States, all actions having for their object the recovery of either real or personal property, or for the payment of money, should be prosecuted on the law side of the Court."

Oil Co. vs. Miller, 175 Fed. 735.

SECTION 240. But if the Plaintiff is in possession when he begins his suit, the very gravamen of the action is missing. He has suffered no wrong, and has no remedy at law or in ejectment. He cannot "have and recover" from Defendant that which is already in his possession, and which the Defendant is not detaining from him. Few citations will be necessary on this point; the law is abundantly stated in every text book.

"It is a general rule that ejectment can only be maintained by one out of possession. Primarily it must be shown that Defendant keeps the Plaintiff out of possession unlawfully, or that there is an ouster, dispossession or disseizen, actual trespass, or tortious entry, as well a wrongful possession."

15 CYC. 53.

Ejectment only lies against a Defendant in possession or occupancy at the time when the action is commenced.

15 CYC. 54 notes 60-70.

SECTION 241. There is no allegation in either of the complaints of either ouster or detention at time the suit was commenced, wrongful or otherwise.

The sole allegation of that nature is in paragraph III, viz:

> III. "That on or about the 1st day of August, 1914, the Defendant wrongfully and without right, entered certain portions of said Guy Davis Mining Claim."

SECTION 242. The complaint was filed and summons issued in each of the actions on September 30, 1914, about sixty days after August 1, 1914. The complaints do not allege that the Defendant is still in possession, or keeping the Plaintiffs out, at the time suit was started. The contrary appears from Paragraph 1 of the complaint, wherein it is alleged:

> "That ever since the.....day of September, 1913, Plaintiffs and their predecessors in interest were the owners of *and in actual possession and occupancy* of the Guy Davis Placer Mining Claim (giving dimensions and location), and ever since have been and now are the owners of and entitled to the possession of such mining claim." (Record, page 15-16.)

Actual possession, title, and right to possession in Plaintiffs and their predecessors ever since September,

1913. There is no dispossession or detention, by Defendant, alleged here.

SECTION 243. True, the complaints proceed to allege (in paragraph III), after the words quoted above, as follows:

> "and on or about said day (Aug. 1, 1914) said Defendant filed in the U. S. Land Office at Elko, Nev., diagram and field notes of the Salt Lake No. 3, and also the John John and other lodes, and filed therewith an application for patent of the U. S. for said Salt Lake No. 3, and * * * caused notice of such application for patent to be published, etc., and in said application did apply for patent for all of said Salt Lake No. 3 lode, including the ground in conflict, (describing it.)
>
> "That by said application for patent, and by said wrongful entry aforesaid, Defendant wrongfully and without right entered said Guy Davis Placer" (including the ground in conflict.) (Record, page 16-17.)

SECTION 244. But these allegations, as above, denote and specify solely and merely and alleged unfounded and wrongful adverse claim by the Defendant to the said Guy Davis ground, made and asserted side by side with, and during and at same time with, the Plaintiffs' *actual* and *continuing possession, title, and right to possession* of the ground in question. The "entry" by Defendant

referred to in Paragraph III of the complaint, which occurred on August 1, 1914, two months before suit, must therefore have been a mere casual and transitory entry upon certain parts of the ground, even if physical entry upon the ground was intended to be alleged at all, which it was not; for Plaintiffs say:

> "That by said application for patent, and by said wrongful entry aforesaid, Defendant wrongfully and without right, entered said Guy Davis Placer."

Thus alluding to a mere constructive entry, by the assertion of an unfounded adverse claim to the ground, without, however, disturbing the Plaintiffs' *actual possession* of the ground, which, as shown in Paragraph I, has continued *ever since September*, 1913, which includes the time up to the date of the pleading, on Sept. 30, 1914.

> "There is no possession by Defendants alleged here, other than as constructive possession may be inferred from their acts of location."
>
> Phillips vs. Smith, 95 Pac. 91-92.

SECTION 245. And, by the prayer of their complaints herein, Plaintiffs ask a decree:

> "That they are the owners, in possession of, and entitled to the possession of said Guy Davis Placer Claim."

In practically the same words in which they allege the

facts that they are *actually* the *owners of,* in *possession* and *entitled to the possession* of said Guy Davis Claim.

We will show, upon other pages of this Brief, that a mere constructive entry or possession by Defendant, without actual dominion, control, or interference with Plaintiffs by Defendant, will not sustain an action *at law* for possession. But that inquiry relates more especially to the evidence, though having its place here also.

SECTION 246. But the complaints go further, and contain other allegations not in the least relevant to the statement or attempted statement of an acion at law. For, besides the allegations that plaintiffs have been in possession of the property ever since September, 1913, they allege also, in Paragraph III, that the Defendant is asserting a wrongful adverse claim to the property, and is applying for a patent adversely to the Plaintiffs, and, in their prayers, ask the Court for a decree that they *are the owners and in possession* and *entitled to the possession* of the property.

But these allegations are irrelevant to an action at law to recover possession, and relate solely to certain equitable relief to which Plaintiffs might believe themselves entitled, had they sought to clear their title and possession of a wrongful adverse claim, under Sec. 5514, Sub.-Sec. 572 of the Nevada Code, based on their actual possession and title. These have nothing to do with a suit at law in the Federal Court, where unliquidated dam-

ages and restoration of possession are sought. They must therefore be disregarded.

Hence Plaintiffs have no remedy in these actions at law. They cannot recover possession of that which they do not claim is being withheld from them. They cannot claim relief in equity by cancelling a wrongful adverse claim, because they have not sued in equity but at law.

SECTION 247. The circumstance that these are adverse suits under U. S. Rev. St. Sec. 2325-2326 does not affect the question. That section does not attempt to prescribe the *form of action* which the adversing parties shall adopt. It merely sends them into Courts of competent jurisdiction to determine the right of possession, which they must seek under such forms of procedure as they there find adapted to the controversy. This has been decided many times.

> U. S. Rev. Sec. 910 provides that actions concerning mining claims shall not be affected by the fact that the paramount title to the property involved may be in the United States, but that each case shall be adjudged by the law of possession.

SECTION 248. U. S. Rev. Secs. 2325 and 2326 do not themselves prescribe any form of procedure or form of complaints, but leaves that to the law of the forum. When mining adverse suits are brought in the State Court, the State laws govern the sufficiency of the complaint and all matters of proof and decision. When

brought in, or removed to Federal Courts they must conform to Federal laws and procedure.

In either State or Federal Courts the form of the action should be that prescribed by the law of the forum for the particular controversy tendered for decision.

(F) NATURE OF ADVERSE SUIT, AT LAW OR EQUITY.

SECTION 249. A few cases have held that mining adverse cases are in their nature always equitable, from the nature of the controversy to be determined; but most of the reported decisions follow or agree with the United States Supreme Court in *Perego vs. Dodge,* 163 U. S. 160, 41 L. Ed. 113, wherein it was held that such a suit may be either legal or equitable. That it is at law when Plaintiff has been dispossessed, and is out of possession; and that it is in equity when Plaintiff is in possession, and seeks to have his title quieted from the wrongful adverse claim of the Defendant. Which is but a statement of the original common law and equity rules on the subject.

Perego vs. Dodge, 163 U. S. 160; 41 L. Ed. 113;

Min. Co. vs. Rutter, 87 Fed. 803-5;

Durgan vs. Redding, 103 Fed. 914;

420 Min. Co. vs. Bullion Min. Co., 9 Nev. 240;
Lindley on Mines, Sec. 754, note 1; 12 Nev. 312-3; 123 Fed. 936-40;
1 Snyder on Mines, Sec. 715;
Young vs. Goldsteen, 97 Fed. 303;
Houts vs. Gisborn, 1 Utah 173.

SECTION 250. And experience, accordingly, shows that these two forms of action, viz: At law to recover possession; and equity to quiet title, are each customarily resorted to by mining adverse claimants in different cases arising, the decision or selection depending upon whether the Plaintiff or Defendant was in or out of possession when suit was started.

1 Snyder on Mines, Sec. 715, note 1.

SECTION 251. In the following cases the action was in the nature of a suit to quiet the title, because Plaintiff at the time was in possession, and Defendant out of possession, but claiming it.

Perego vs. Dodge, 163 U. S. 160; 41 L. Ed. 113;
Parleys Park S. M. Co. vs. Kerr, 130 U. S. 256; 32 L. Ed. 906;
Shoshone Min. Co. vs. Rutter, 87 Fed. 801;
Preston vs. Hunter, 67 Fed. 996;
Doe vs. Waterloo, 43 Fed. 219;
Le Doux vs. Forrester, 94 Fed. 600;

Altoona Etc. Min. Co. vs. Integral Min. Co., 45 Pac. 1047;

Mattingly vs. Lewisohn, 35 Pac. 111;

420 Min. Co. vs. Bullion Min. Co., 9 Nev. 240;

Mars vs. Oro Fino Min. Co., 65 N. W. 19;

Hayes vs. Lavagnino, 53 Pac. 1028.

SECTION 252. But in the following cases the action adopted was in ejectment, or at law to recover possession, because Plaintiff alleged himself out and the Defendant in and detaining from him.

Gwillim vs. Donnellan, 115 U. S. 45; 29 L. Ed. 348;

Patterson vs. Hitchcock, 3 Colo. 533;

Becker vs. Pugh, 9 Colo. 589; 13 Pac. 906;

Marshall vs. Kirtley, 12 Colo. 410; 21 Pac. 492;

Lebanon Min. Co. vs. Min. Co., 6 Colo. 371;

Burke vs. McDonald, 13 Pac. (Idaho) 351.

The foregoing is only a few of the cases brought under each head, and they may be multiplied indefinitely.

SECTION 253. "When the proceeding is simply for the recovery of specific real or personal property, or for a money judgment, the action is one at law."

WHITEHEAD VS. SHATTUCK, 138 U. S. 146; 34 L. Ed. 873.

"A right of action of a claimant of a mining claim who is out of possession, against another in possession, concerns possessory rights, the title being in the United States, and his remedy is at law."

Davidson vs. Calkins, 92 Fed. 230.

SECTION 254. Ejectment being a possessory action, seems specially adapted to the determination of mining adverse suits, where Defendant is in possession, and Plaintiff out. U. S. Rev. St. Sec. 910, provides:

Sec. 910. No possessory action between persons in any Court of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie, is in the United States, but each case shall be adjudged by the law of possession."

"Ejectment will lie for a mining claim although the paramount title is in the United States."

Davidson vs. Calkins, 92 Fed. 230.

Hill Cons. Min. Co. vs. Min. Co., 34 Fed. 515, 520.

"The complaint should allege the fact as to possession where that fact is material in determining the character of the action."

Lindley on Mines (3rd Ed.), Sec. 755, page 1848.

SECTION 255. *Effect of State Statutes.* This action was begun in a State Court of Nevada, and removed into the Federal District Court for Nevada. Hence Plaintiffs below claim some benefit to their complaint from certain provisions of the Nevada statutes, in whose courts the action was begun. We quote from Nevada Comp. Laws of 1912:

> "There shall be in this State but one form of action for the enforcement of private rights and the redress or prevention of private wrongs."
>
> Sec. 49 Sub-Sec. 1.
>
> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."
>
> Sec. 5541, Sub-Sec. 572.
>
> "The action of ejectment is unknown to our system."
>
> Alford vs. Dewin, 1 Nev. 172.
>
> "Under our practice the different forms of action are merged into one action in which both the right of possession and the right of property are tried."
>
> Sherman vs. Dilley, 3 Nev. 25.
>
> "In all actions to determine the right of possession of a mining claim * * * it shall only be necessary to *confer jurisdiction to try said ac-*

tion, that it appear that an application for patent has been made for such mining claim, and that the parties to the action are claiming such mining claim or the right of possession thereof."

Sec. 5526.

SECTION 256. But according to Lindley on Mines, Sec. 754 (Note I), the decisions in Nevada are in line with those of the United States Supreme Court and elsewhere where the jurisdictions at law and equity are separate, that U. S. Rev. Stat. Sec. 2325-6 for mining adverses does not confer any new jurisdiction. But that the action is in equity if the Plaintiff is in possession, and at law by way of ejectment, if he is out of possession and defendant in. And Lindley cites to this effect 9 Nev. 240, and 123 Fed. 936-40.

SECTION 257. I do not know if we are justified in taking the time of this Court upon the effect of the State statutes and decisions in Nevada, seeing that the U. S. Supreme Court whose province it is, has decided the matter by its decisions cited in Secs. 249-253 hereof. The Nevada statutes and decisions are at most binding upon their own courts, where the ancient distinctions between cases at law and equity are in a measure lost sight of, as usually happens under the codes of civil procedure.

In the Federal Courts, these distinctions are sedulously preserved, and if in an action begun in the State

Court the complaint does not, by its allegations, properly classify itself as at law or in equity, it is Plaintiff's duty when the case is removed into a Federal Court to reframe his pleadings, if necessary, and conform to the rules of pleading in an action at law if the suit is at law. To this effect:

Fletcher vs. Burt, 126 Fed. 619-621.
Creede vs. Uinta, etc. Co., 196 U. S. 342-3, 49 L. Ed. 506;
Motley Co. vs. Steel Co., 130 Fed. 396.

SECTION 258. The Nevada statute Sec. 5526 supra, does not even purport to establish the *rule of pleading* as to what will state a *cause of action.* Of course, the fee of a mining claim being in the United States, it may be that without legislation by Congress, a State Court would have no jurisdiction to adjudicate upon such property. This Congress gave by U. S. Rev. St. Secs. 910 and 2326, and the Nevada Supreme Court said in Rose vs. Min. Co., 27 Pac. 1109, Col. 1, that the Nevada statute Sec. 5526 (it was then Sec. 1674 Nev. Statutes) was designed to supplement U. S. Rev. Stat. Sec. 2326 and give to the Nevada District Courts *jurisdiction* to determine the right of possession between adverse claimants to mining property. When jurisdiction is shown, then the sufficiency of the complaint to state a cause of action would be determined by other provisions of the statutes and decisions. We have not questioned

the *jurisdiction* of the Nevada District Court up to the time of our removal of the case into the Federal Court, and their statute Sec. 5526 has no further bearing. Being a State Statute it could not if it purported to do so, alter the requirements for a complaint at law in a Federal Court, in the matter of alleging ~~possession~~ ouster and detention, or at all.

SECTION 259. *Law and Equity Distinctions* in Federal Courts.

"The judicial power shall extend to all cases in *law and equity* arising under this constitution, laws and treaties, etc.

U. S. Const., Art. III, Sec. 2.

"The judicial power of the United States shall not extend to suits in *law and equity,* commenced or prosecuted against one of the United States, by citizens of, etc.

11th Amendment to Const. of U. S.

"The forms and modes of proceeding in suits at law ~~in equity~~, etc., shall be according to the principles, rules and usages which belong to the practice, pleadings, forms, etc., in like cases in courts of record in the state within which such Circuit or District Courts are held, etc.

U. S. Rev. St. Sec. 914.

Equity cases Rev. St. Sec. 912.

Suits in equity shall not be sustained in either of the Courts of the United States in any case

where a plain, adequate and speedy remedy may be had at law."

U. S. Rev. St. Sec. 723.

SECTION 260. Montgomery's Manual of Federal Procedure shows in Secs. 5, 6, 8, 10, 581, 602, 603 and sundry other sections how these distinctions between the requirements of pleadings and procedure in legal and in equitable actions must be observed, and any infringement visited with appropriate corrective remedies, and any merging of the two is forbidden. Foster's Fed. Procedure and every other work on the subject lays down the same rules, statutes, principles and decisions.

SECTION 260a. "After a case is removed from a State Court to the Federal Court the said cause shall proceed in the same manner is if it had been commenced in said Federal Court."

Foster's Federal Practice, P. 1893, Note 1, citing U. S. Judicial Code, Sec. 29 (36 Stat. Large 1087).

"The practice after removal must be substantially in accord with the modes of procedure followed in the Federal Courts in original cases."

SECTION 261. *State Statutes and Decisions Impotent.* A State Legislature may by statute abolish these distinctions in its own court, but cannot authorize a litigant to so frame his compalint, as to ignore those dis-

tinctions when it is either filed or removed into a Federal Court where the distinctions are preserved.

"State practice will not be followed *in actions at law* so far as to permit a suit that is purely equitable, to be tried upon the common law side of the Court."

"Foster's Fed. Prac. Sec. 453, P. 1422, Note 8, citing cases.

"The Constitution of the U. S. has recognized the distinction between law and equity, and it must be observed in the Federal Courts, although there is no distinction between them by the laws of the State."

Fenn vs. Holme, 21 How. (U. S.) 481;

Bennett vs. Butterworth, 11 How. 669; 13 L. Ed. 859;

Sheiburn vs. Gordova, 24 How. 423-6; 16 L. Ed. 741.

SECTION 262. "The difference between causes of action at law and in equity, is a matter of substance, and not of form. In the national Courts, the ineradicable distinction between them, is as sedulously preserved in the forms and practice available for their maintenance, as it is in the nature of the causes themselves, and in the principles upon which they rest."

Mining Co. vs. Strickley, 116 Fed. 854.

"Equitable causes and defenses are not available in actions at law, because they invoke the judgment ,and appeal to the conscience of the Chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law, by the rule which entitled either party to a triai of all the issues of the fact by a jury."

Mining Co. vs. Strickley, 116 Fed. 854.

"In the Federal courts an action at law cannot be maintained in equity, nor is an equitable cause of action or an equitable defense, available at law."

Mining Co. vs. Strickley, 116 Fed. 854, citing cases.

SECTION 263. *And Generally,* a state statute or decision or rule of practice of a State, prescribing a rule of pleading in the Courts of the State, which eliminates, abolishes or ignores the fixed distinctions between actions at law and in equity, have no effect or operation upon causes in the Federal Courts of that State either begun or removed thereto from the Courts of the State.

Goodyear vs. Dancel, 119, Fed. 695, citing cases;

Hollins vs. Coal Co., 150 U. S. 371; 37 L. Ed. 1113;

Sheiburn vs. Cordova, 24 How. 423; 16 L. Ed. 741.

Beatty vs. Wilson, 161 Fed. 453-60;
Cook vs. Foley, 152 Fed. 52;
Whitehead vs. Shattuck, 138 U. S. 146; 34 L. Ed. 873;
Morrison vs. Marker, 93 Fed. 692;
Davidson vs. Calkins, 92 Fed. 230;
Oil & Gas Co., 96 Fed. 12-25;
R. R. Co. vs. Goodrich, 57 Fed. 879;
Johnson vs Munday, 104 Fed. 594;
Young vs. Goldsteen, 97 Fed. 303-8-9.

SECTION 264. The case of Young vs. Goldsteen, supra, is a mining adverse case in which the Court say:

"The action (mining adverse) is purely statutory with no form prescribed. Some Courts go so far as to hold that the action should always be brought on the equity side of the Court. (75 Fed. 37). But the question of the form of the action in such cases is *settled once and for all* by the Supreme Court of the United States in Perego vs. Dodge, 163 U. S. 160 when that Court say:

"An action at law or a suit in equity would lie as either might be appropriate under the circumstances;—an action to recover possession when Plaintiff is out of possession, and a suit to quiet title when he is in possession."

"The plaintiffs in the cases before us are in possession of the premises, and suits in equity to

quiet title should have been brought. Such suits have been brought in cases No. 872, 873 and 885 but they are deficient in form; the first two in several respects. The remaining 36 cases are actions at law, although in each case Plaintiff admits that he is in possession of the premises."

"For the reasons assigned, the demurrer in each case will be sustained."

97 Fed. 303-8-9.

For the same reasons given in Young vs. Goldsteen, supra, the Trial Court should have regarded Perego vs. Dodge, 163 U. S. 160, as binding and settling the question of form of the action, and for like reasons have held the complaint insufficient at law.

SECTION 265. *The Complaint.* Going back now to the complaint, it alleges that ever since a certain date, the Plaintiffs were or have been in possession. No expiration of possession is alleged, as would be if they had been dispossessed.

In Ferris vs. McNally, 121 Pac. 290-1 we have an example of a sufficient complaint in ejectment for a mining claim, wherein the Court say:

"The complaint stripped of immaterial matters alleges title, possession and right of possession in Plaintiffs; an unlawful entry and ouster by the Defendants on Dec. 10, 1909, and the withholding of

possession by them since that date; to Plaintiffs' damage in the sum of $....."

"In an action for possession of mining claims in ejectment, it is necessary to allege ouster and wrongful detention in the complaint."

Contreras vs. Mack, 63 Pac. 336.

SECTION 266. Mining Co. vs. Perasich, 7 Fed. 331 also, like Ferris vs. McNally contains a sufficient averment of ouster in the complaint, but turns on a failure to *prove* ouster, which is also a matter arising later upon the proof in the case at bar.

A considerable number of cases on this subject will appear in connection with the insufficiency of the evidence to prove ouster or detention, wherein no question was made as to the complaints failing to allege ouster. But whatever is vital to be proved, must also be alleged, in order to raise the issue. And a failure to allege a vital and necessary fact, like wrongful ouster or detention, is equivalent in effect to an entire failure to prove those facts. And an omission to prove, caused by an omission to allege, is equal in effect to a failure to prove, arising from negligence, inability, or any other cause.

SECTION 267. But, they say that in Paragraph III of their complaint they do allege ouster, when they say that on or about Aug. 1, 1914, the Defendant entered certain portions of the Guy Davis Placer claim, and on or about said day filed an application for patent, etc.

This "*entry,*" if it was a physical entry or presence at all on certain parts of the Guy Davis, is not helped by the averment of application for a patent, for the latter relates to a wrongful adverse claim, and is in equity. But the "entry" itself, is not said to be a physical presence but may have related to the form of application in the Land Office, as a mining entry, agricultural entry, townsite entry, etc. But even if it were so adjudged, it was for all that appears, a mere casual entry or presence, not amounting to manual or physical detention of the ground, or exclusion of the Plaintiffs therefrom; such a casual entry or presence as the U. S. Supreme Court noticed from the record in Reavis vs. Fianza, 215 U. S. 22; 54 L. Ed. 72.

SECTION 268. And anyhow, it was on Aug. 1, 1914, which was two months before this suit was begun, and there is no averment in the complaint that the entry, or casual visit, or whatever it was, was continuing or interfering with Plaintiffs' own alleged possession at the time the suit was begun, as in Paragraph 1 of the complaint. The Defendant might have been there on August 1, 1914, but if he did not remain, and did not keep Plaintiffs out of possession when the suit was begun, then there was no such wrongful ouster or detention as can make the complaint good in this action. It could at most found an action of trespass if any damage was done by the temporary entry or presence two months before.

Furthermore, as to this contention of averring ouster in fact, we cannot admit that the Plaintiffs in framing their complaints, had in mind and sought to comply with, a rule of pleading in this respect which they did not then and do not now concede to exist, but on the contrary they insist it is not necessary to allege ouster or detention under the rule in Nevada.

SECTION 269. They say further it is not necessary to allege ouster in the case of wild, unimproved and unoccupied land. But they do not allege this land to be wild or unoccupied, or not in the actual possession of either party. If we could take a peep at the evidence in this connection, it would appear otherwise. But long continued good faith possession by Defendants below under claim and color of title, is a different thing from a recent forcible or wrongful entry, possession and detention from another of his property, which is the situation Plaintiffs in ejectment seek to adjust their complaint to. The complaint is too meager to go any further in this direction.

SECTION 270. *Other Defficiencies.* There are cases, like Schultz vs. Allen, 48 Pac. 960, holding that a mining adverse complaint is insufficient unless it alleges all the facts of location, which when carried into the verdict or judgment, will inform the Land Office and enable it to issue a patent without further investigation. If this is the law, the complaint is further insufficient for that reason.

See secs. 209 a-217, and 220-220 a post.

(G) RELIEF ASKED.

SECTION 271. *Relief Asked.* We ask the Court to hold that the complaint does not state facts sufficient to constitute a cause of action, for each of the reasons stated in this chapter; that he complaint is insufficient in form and substance to sustain the verdict or judgment; that the judgment be reversed, but that for reasons stated in other chapters hereof, the Plaintiffs have no standing as parties, and no interest in the subject matter of this litigation; that their adverse be rejected, and Plaintiffs in Error permitted to have judgment for the ground included in the Salt Lake No. 3 Lode claim.

CHAPTER VIII.

THE EVIDENCE.

Insufficiency to prove a Cause of Action, in Failing to prove *Vacancy, Unoccupancy and Non-appropriation* of the Ground at the Time of the Conflicting Guy Davis Relocation.

Section

(A) Assignment of Error.....272
(B) The Testimony 275
(C) Effect of Actual Possession by Defendant under Claim and Color of Title, at the time of Plaintiffs' Attempted Junior Conflicting Location 281
(D) Actual Possession Defined.....289
(E) Constructive Possession 297
(F) Relief Asked 306a

SECTION 272. (*A*) *Assignments of Error.* We have shown in the preceding chapter, Secs. 206, 229-236, that a mining adverse claimant should either allege that the ground was vacant, unoccupied public land of the United States, or if there is some prima facie mining claim, at the time, he must allege some fact or facts showing the invalidity of the earlier location, before his own has any existence. When it comes to the evidence he must *prove* the same thing or things. If he has failed to allege either when he comes to prove, he is that much worse off. But his failure to allege cannot *relieve* him

from proving, if he would succeed, though it may *prevent* him from proving, if the law is enforced against him. In this case the adversing Plaintiffs did neither, and we assign as error, that the evidence is insufficient to support or justify the verdict and judgment because:

SECTION 273.

Assignment No. 41 (Sec. 673, post.)

1. The evidence was insufficient to show that the ground included within the boundaries of the relocated DAVIS LODE CLAIM (sometimes called the Guy Davis Lode claim, and Guy Davis Placer), was at the time of such relocation, vacant, unoccupied or unappropriated public land of the United States, subject to location.

2. On the contrary, the evidence shows affirmatively, positively and without conflict, that at the time of such relocation, on Sept. 5, 1913, the said ground was NOT vacant, unoccupied or unappropriated, but that said ground was at said time actually held, occupied, claimed and owned by Defendant's grantors under location as the Salt Lake No. 3 lode mining claim, and had been so held, owned, occupied and claimed for more than sixteen years, duly staked, monumented, recorded, and improved with all annual labor and assessment work duly performed and not subject to forfeiture; with valuable buildings erected and standing thereon, including a mill,

leaching plant, office building, bunk house, pipe line, etc.; with sundry cuts, excavations, shafts and openings old and new, made thereon by said owners, costing many thousands of dollars, including recent development work thereon; and with the original boundary stakes and monuments still standing thereon to inform and warn trespassers; also one or more agents and employees of the owner residing and present on the ground, and living in one of the houses thereon, and having custody and dominion of the ground and improvements on behalf of the owner at the time of the alleged Guy Davis relocation.

7. The evidence shows without conflict that the Salt Lake No. 3 is one of a group of about twenty contiguous lode mining claims, which have been owned and operated as a group of claims for many years; that into the ground covered by said group, have been sunk or drifted extensive workings, shafts, tunnels, adits, crosscuts, drifts, etc., including one tunnel over 1,000 feet long, and another 300 feet long, some of said workings intended to develop all of said claims, and some for portions thereof, and some for ~~legical~~ local development; that the buildings and excavations are of very large value, and necessarily cost many thousands of dollars, or hundreds of thousands. That the purchase price of

the Salt Lake No. 3 with 14 other claims of said group on April 9th, 1898, was SIXTY THOUSAND DOLLARS ($60,000.00). That most of the valuable buildings are on the Salt Lake No. 3; that the value of the placer deposits alone in said three lode claims (in the gulch), is $100,000; and that enormous values belonging to the Defendant will thus be handed over to the claim jumpers, without consideration, if the verdicts of the jury be upheld.

SECTION 274. *Plaintiffs' Evidence Below.*

As stated in the foregoing Assignment, Plaintiffs did not prove vacancy, unoccupancy, or unappropriation at the time of their relocation, but did in large measure prove the reverse. They disclosed sufficient in the way of occupancy and appropriation of the premises under our lode mining claims, to justify non-suit under the cases we cited in Sec. 206 hereof and elsewhere. It is true some of the Federal Courts have held that they will not reverse for error in refusing a non-suit for a deficiency of evidence of the plaintiff, because they say the missing evidence may be supplied by Defendant, and if so, and if upon the whole evidence, Plaintiff is entitled to judgment, it will not be reversed for failure of Plaintiff to complete the requisite proof in chief.

This seems a just rule, and if Plaintiffs here after having not only failed to prove the ground was vacant, unoccupied and open to entry at the time of the junior

locations, but testified to facts inconsistent therewith, can obtain any comfort by recourse to our evidence in defense, they are welcome. The whole subject of the law of non-suit is treated in Secs. 510-520 post, and for the present we devote ourselves to all the *evidence* as to vacancy or occupancy, appropriation, etc. at the time of the Davis Lode relocation.

We will cite to the pages of both Plaintiffs' and Defendant's testimony on this subject, and it will be seen that Plaintiffs' position is not improved whether considered upon their own testimony alone, or upon both Plaintiffs' and Defendant's testimony (see secs. 510-520 post.)

SECTION 275. (B) The Testimony by Plaintiffs and Defendant.

The following improvements are and were situated entirely on Salt Lake No. 3, except a portion of the mill laps over on Salt Lake No. 4 to the east, and denote possession by the owner of said ground, to-wit:

Valuable Buildings.

Plaintiffs' Evidence, Record pp. 216, 221, 245.

Defendant's Evidence, Record pp. 542, 568, 592, 618, 624, 687-690, 1000-1, 1066, 665, 666.

Mill Building.

Plaintiffs Record, pp. 216, 232-3, 245, 294, 352.

Defendant's Record, pp. 595, 618-19, 660-1, 752-

3, 866-7, 1032 and 1056; mill process described, Record pp. 864, 867, 1056.

The mill was constructed on a set of benches excavated out of rock on the side-hill, at a very considerable cost, the amount of such cost objected out, but admitted by Plaintiffs to have cost at least $1000 for part of the excavation alone for the mill which is on Salt Lake No. 3, (Record p. 662);

Plaintiffs' Testimony, Record pp. 232-3, 294, 333.

Defendant's Testimony, Record pp. 589, 617.

Well.

Plaintiffs' Testimony, Record pp. 231, 294, 333-4.

Defendant's Testimony, Record pp. 584, 752, 852.

Private Wagon Road.

From main Country Road in Gulch up the side hill to the mill.

Plaintiffs' Testimony, Record pp. 233, 293, 332, 340.

Defendant's Testimony, Record pp. 542, 646-8, 662, 730, 752, 853, 901, 1008, 1033.

Which roadway was mostly in hard rock, required blasting, and the excavation for road costing

a large sum, admitted by Plaintiffs to be at least $500. (Record p. 662.)

Plaintiffs' Testimony, Record pp. 293, 332, 340, 333.

Defendant's Testimony, Record pp. 589, 617-8, 646, 662 and pages cited above.

Recent Development Work.

done by the Glasgow & Western Exploration Company, then owner of the ground, as the Salt Lake No. 3 Lode Mining Claim.

Plaintiffs pp. 231, 233, 240.

Most of the foregoing also shown on Plaintiffs' Exhibit A map.

Purchase Price of Salt Lake No. 3 and 12 others on April 9, 1898, $60,000.00.

Exhibit No. 39, Record pp. 1094-9.

Open Cut K on Map, Exhibit A.

Plaintiffs, Record p. 293.

Small shaft at lower end.

Plaintiffs, 68. Record p. 294.

2585

Placer Shaft in S. W. corner of claim.

Plaintiffs, pp. 232, 233-4.

Defendant, pp. 648-9, 681-2, 837-8, 968-70, 993-1000.

Shaft near Well.

Plaintiffs, p. 334.

Sundry other Excavations.

Plaintiffs, pp. 354, 333-4.

Boundary Monuments, according to original location of the Salt Lake No. 3.

Plaintiffs, p. 329-30.

Admission by Plaintiffs' counsel, pp. 977-8.

Defendant, pp. 567-8, 576-7-8, 603-4, 608, 623-5, 654-5, 696, 743-4.

Annual Labor.

It is not questioned that all the annual labor or assessment work upon each of the lode claims, including the Salt Lake No. 3 was fully kept up and performed, and there was no question as to forfeiture in the case for any such non-performance.

See evidence and affidavits of labor, in Secs. 115-119, Secs. 171-173, 179, and 221 ente;
Plaintiffs' admissions, Record pp. 686, 1202;
Court's instruction, Record p. 1225-6.

SECTION 276. There were some sleeping houses on the ground at an early day, constructed and used by the old or new Battle Mountain Mining Company which had operated in the Canyon in by-gone times, but the most substantial buildings, mill, leaching tank, sleeping houses, office, boarding house and wagon road to and past the mill, were constructed by the grantor of Plaintiff in error as late as 1912. The subject of these buildings is cited to the record in Sec. 275 ante. The photographs Defendant's exhibits Nos. 3, 9, 12 and 13 and the testimony in connection therewith on record pages 594-6 and 687-689 identifies the new and the old buildings. (See photos in Sec. 468 post).

SECTION 277. Attention is called also the testimony in the addenda to Chapter III, or Secs. 171 173 of this brief, for many more details of the improvements and group work appertaining to, and denoting an absence of vacancy of each of the units of the group, including the Midas, Evening Star and Salt Lake No. 3.

Also the constant presence and residence on the ground of our agent, foreman and caretaker, Joseph Jurey, looking after the property of the Company, and keeping up the boundary monuments (Rec. p. 654) on each of the lode claims, including those herein involved. He and his brother and other men employed on the property from time to time, constantly resided in the houses on the ground, and worked on and cared for the prop-

erty from the date of the location of the lode claims to the time of the trial; and men were living and working there in the employ of the owner dur[illegible] 1913 in which year the conflicting Davis claim was sought to be re-located. See record pages 568-9, 607, 624, 644-5-6, 662-3-4-5 et seq. 430-1, 1000-1, 1002-3, 1066-71. The men were working on the mill and benches for the leaching tanks, which were completed in 1913, only a little while before the ground was sought to be taken under the Davis relocation.

SECTION 278. Joseph Jurey was actually residing on the ground and caring for the property for its owner, when they attempted to relocate the Davis lode claim, attending to the assessment work, keeping the property in repair and representing the owner. (Record pages supra), but was temporarily absent at the time. Van Orman, one of the jumpers in telling what he found on the ground at the time of the jumping, spoke of observing "recent development work done by the Glasgow and Western" (record pp. 232-3), then owner of the ground.

Additional evidence showing the cost of these group improvements of every nature, and the comprehensive nature of the expenditures thereon by our grantors, and good faith in holding the ground, was also offered and rejected under our opponent's objection, and the rulings assigned for error and discussed hereafter. (Secs. 563-576 post).

SECTION 279. And the ground was not unappropriated, but was actually appropriated and held by Plaintiff in Error's grantor under the Salt Lake No. 3 lode location, as witness the evidence referred to in the preceding sections. Also as witness the recorded location papers of each claim, the boundary monuments, annual labor, general improvements and conveyances of title by continuous chain from the locator down to Plaintiff in error.

The original posting, monumenting, recording, etc., were proved in detail, but not questioned by defendants in error. Hence we will not repeat record page citations.

SECTION 280. *Resume.* It is very clear from the foregoing that Defendants in error did not discharge the burden that was upon them as Plaintiffs and junior locators, to show that the ground was at the time of their location, open and vacant, unoccupied and unappropriated public land of the United States. As a consequence they should fail, for want of proof of the most essential fact in their case.

Bevis vs. Markland, 130 Fed. 226.

Cases cited in Sec. 121 hereof.

(C) EFFECT OF ACTUAL POSSESSION BY DEFENDANT UNDER CLAIM AND COLOR OF TITLE, AT THE TIME OF PLAINTIFFS' ATTEMPTED JUNIOR CONFLICTING LOCATION.

SECTION 281. *Effect of actual Possession.* Furthermore, actual possession by plaintiff in error and his grantors, at the time of the attempted Guy Davis location, under claim and color of title as lode mining claims, is sufficient to invalidate their junior location, and make unlawful an entry without our consent for the purpose of prospecting for mineral and initiating a junior location on the ground.

"No rights can be initiated upon Government Land which is in the *actual possession* of another."

Thallman vs. Thomas, 111 Fed. 277;

Nash vs. McNamara, 93 Pac. (Nev.) 408, vol. 2;

Nickals vs. Winn, 17 Nev. 188-93; 30 Pac. 435;

McBrown vs. Morris, 59 Cal. 64-72;

Goodwin vs. McCabe, 75 Cal. 584-88; 17 Pac. 705;

Rourke vs. McNally, 98 Cal. 291; 33 Pac. 62;

Brown vs. Killabrow, 21 Nev. 438; 33 Pac. 865;

Oil Co. vs. Oil Co., 98 Fed. 674-80;

Reavis vs Fianza 215 U.S. 16.

Tronath vs. San Francisco, 100 U. S. 251; 25 L. Ed. 626;

Haws vs. Min. Co., 160 U. S. 303-17; 40 L. Ed. 436;

Atherton vs. Fowler, 96 U. S. 518-9; 24 L. Ed. 733;

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735;

Lockhart vs. Farrell (Ut.), 86 Pac. 1075, 1078-9;

Book vs. Justice Min. Co., 58 Fed. 107;

Bevis vs. Markland, 130 Fed. Rep. 226.

SECTION 282. "Where Defendants were in the actual possession of a mining claim, and engaged in developing it, claiming to be the owners, the Plaintiffs cannot initiate title thereto by a survey and the recording of a location certificate."

Omar vs. Soper, 18 Pac. 443-8.

"Even where a party, Plaintiff or Defendant, is unable to show a valid location in accordance with the mining laws in force, yet if he show actual possession under color of title at the time the other party entered, he may recover in ejectment."

Lebanon Min. Co. vs. Min. Co., 6 Colo. 372, citing:

Harris vs. Equator Min. Co., 2 Colo. L. R. 634.

SECTION 283. This actual possession and color of title, the Plaintiffs have shown for Defendant, in their case in chief, which facts arise to confound Plaintiffs, and to invalidate all their procedure, and convicts them of trespass, instead of furnishing title.

In *Lebanon Min. Co. vs. Con. Rep. Min. Co.*, 6 Colo. 371, a possessory action, there was evidence of possession in the expenditure of large sums of money in development of property in dispute, on the workings, in the tunnel, and upon the surface.

HELD: "Proof of *possession* is always *proof of title.* It is presumptive of ownership, and until overcome by evidence of a superior character, is sufficient to maintain the action."

See also Sears vs. Taylor, 4 Colo. 38.

SECTION 284. "One may not go upon a prior location to prospect for unknown lodes or deposits, and get title to the values located or discovered in this manner, unless the prior locator has abandoned the claim, waives the trespass, or is estopped to complain of it."

Clipper Min. Co. vs. Ely Min. Co., 194 U. S. 220-230; 48 L. Ed. 944.

"No valid pre-emption or location can be made upon public land which is in the *actual possession* of another, even where such actual possessor has allowed his time to go by for making such purchase, or for taking the steps preliminary thereto; or, in other words, for taking

those preliminary steps which would establish his right of possession as against the Government."

Nickals vs. Winn, 17 Nev. 188-195, 30 Pac. 435, citing:

Hosmer vs. Wallace, 97 U. S. 575.

Trenouth vs. San Francisco, 100 U. S. 251.

Hosmer vs. Duggan, 56 Calif. 257.

Davis vs. Scott, 56 Calif. 165.

McBrown vs. Morris, 59 Calif. 64-72.

SECTION 285. "One who is in the *actual possession* of a mining claim, working it for the minerals it contains, and claiming it under the laws of the United States, whether the location under which he claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise, fraudulently intruded upon, or ousted, while he is asleep in his cabin, or temporarily absent from his claim."

Oil Co. vs. Oil Co., 98 Fed. 674, 680-681.

"A valid claim to unappropriated public land cannot be initiated by a forcible or fraudulent entry upon land *in the possession* of one who has *no right either to the possession or title.*"

Atherton vs. Fowler, 96 U. S. 518-9, 24 L. Ed. 433.

Trenouth vs. San Francisco, 100 U. S. 251-6, 25 L. Ed. 626.

"As the U. S. Rev. St., Sec. 910, prescribes that each case (concerning unpatented mining claims) shall be 'adjudged by the law of possession' the Plaintiff cannot prevail against the Defendants, if they had prior possession under color of title, and did not actually oust him (Plaintiff) from possession."

Bevis vs. Markland, 130 Fed. 225-7.

SECTION 286. In *McBrown vs. Morris,* cited, the land in controversy was within a larger tract which for nearly twenty years had been enclosed by fences and occupied and used for dairy purposes by Plaintiff and his tenants. The Defendant, who was a qualified pre-emptor, entered with the intention of pre-empting said land, and within due time filed his declaratory statement.

HELD: In an action of ejectment, that the Defendant did not acquire the right to pre-empt the land, and that Plaintiff was entitled to recover.

McBrown vs. Morris, 59 Cal. 64, citing: 96 U. S. 513-5.

HELD: Further,

That the Act of Congress of March 3, 1897, entitled: "An Act to prevent settlement upon lands ceded to the United States until authorized by law," provides for removal of intruders from the public lands by the President of the United States, and invests the President with authority to act on behalf of the United States in his

discretion, but does not enlarge the rights of the Defendant in this case.

McBrown vs. Morris, 59 Calif. 64, citing U. S. decisions.

SECTION 286a. "Undoubtedly there have been cases, and may be again, where two persons making settlement on different parts of the same quarter section of land, may enter conflicting claims to the right of pre-emption of the quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open and unenclosed, and neither party interferes with the actual possession of the other, and the settlement of the latter of the two may be bona fide for many reasons. The first party may not have the qualifications of a pre-emptor, he may have pre-empted other lands, or he may have permitted the time for filing his declaration to elapse, in which case any other person may become a pre-emptor; or it may not be known that the two settlements are on the same quarter section. But all of these cases suppose that the parties began their possession, and made their settlements, and built their houses on lands not in the actual possession of another. It is not to be presumed that Congress intended to invite forcible invasions of the premises of another, in fact, to confer the gratuitous right of purchase on the invaders; * * * or to extend the standing invitation to the strong, the daring and un-

scrupulous, to dispossess by force the weak or the timid, in order that the intentional trespassers may secure by this means, the preferred right to buy the land from the Government when it comes into market.

Atherton vs. Fowler, 96 U. S. 413, 24 L. Ed. 733.

SECTION 287. In *Nickals vs. Winn*, 17 Nev. 188-93, 30 Pac. 435, the Court in speaking of the above quotation from *Atherton vs. Fowler*, says:

"The portion of the opinion above quoted shows that the Court considered, in order to create the right of pre-emption, there must be a settlement upon unsettled lands—a condition that cannot exist when the land is in the occupation of another, regardless of the question whether that other is the person entitled to make pre-emption."

To reinforce this view, the Court quotes further from subsequent expressive portions of the opinion in *Atherton vs. Fowler*, 96 U. S. 413, 24 L. Ed. 733, to which reference is made, to avoid repetition; together with cases in the U. S. and State Supreme Court, which have followed it.

SECTION 288. "The possessor of real estate is presumed to be the owner thereof, until the contrary appears; and a like presumption of title arises in favor of the possessor of a mining claim in a mining district.

He is presumed to hold the same by virtue of having complied with the law, and the local rules and customs. * * *"

"When, therefore, the Defendant entered upon the ground in dispute, such ground was not unoccupied, but on the contrary, the Plaintiffs held possession, and occupied, the same, with the exclusive right to such possession and occupation, which presupposes a grant; and the Government having so far vested the Plaintiff with title, there is no room for a like grant to the Defendant."

Gropper vs. King, 1 Pac. Rep. 755.

SECTION 289. *Actual possession defined.* The following decisions illustrate what acts are sufficient to denote and constitute *actual possession,* as distinguished from *constructive possession,* the latter term being used to denote an implication of law only, or the relation of an owner to his property arising solely out of having title thereto, without presence thereon, either in person or by his works or improvements, or agents. As applied to the facts in the case at bar, which we have cited the Court to, we have no difficulty in classifying our possession of the lode claims at the time of the attempted placer location, as *actual* and not *constructive.*

"The building of a shed and a lime kiln on land, operating the lime kiln during one month, leaving tools on the ground are sufficient as acts of possession."

Moore vs. Thompson, 69 N. C. 120.

Where timber and quarry land is claimed by the owner of adjacent property, who leased it for 10 years, and continued thereafter to procure stone and timber therefrom, and permitted others to do so upon payment of the right, and during the time regularly paid the taxes thereon—sufficient as possession, and to sustain title by adverse possession in time.

Calvin vs. McCune, 39 Ia. 502 and cases.

A party may be in possession by himself, or by his agents and servants.

English vs. Johnson, 17 Calif. 108, 116.

SECTION 290. "Going on a claim to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting or preparing to extract minerals from it—as for example, starting a tunnel a considerable distance off, to run into the claim—would be a possession of the claim within the meaning of the rule. * * * Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on, or of a part, and though the party does not enter in accordance with the mining rules, or under a paper title."

English vs. Johnson, 17 Calif. 116.

"A house is said to be in actual possession though not occupied, the claimant having the key and exercising acts of dominion."

Id. 117.

"Fences are not necessary to exclude cattle from mining claims, nor to give notice of a claim to given limits; nor is the power or dominion over the claim at all increased or facilitated by this process. The custom of the country does not require so useless a formality. The physical marks upon and around a claim are sufficient to notify anyone of the possession of the claim, and the claim of the possessor."

English vs. Johnson, 17 Calif. 117.

"We see nothing in the mining laws which would necessarily prevent a party from taking actual possession of mineral land, though when taking possession he did not observe the requirements as to register, and the like act, prescribed by the local laws."

English vs. Johnson, 17 Calif. 118.

SECTION 291. "*Prima facie* being in possession, he is in rightful possession, and no presumption can be indulged that such possession was in violation of any law, local or general. The Plaintiff claims under a purchase and location of a small tract of land, with demarked limits, of which he is in possession; and in the absence of any proof that such claim is opposed to the local rules, we are unable to discover any principle upon which to hold that the possession was wrongful. The Plaintiff need not show, in such a case as this, in the first instance, that he was in possession in accordance with the local

laws; but may (as a vendee in a deed may as to other land), make a *prima facie* case upon possession; and this is enough until the Defendant shows that the possession is wrongful because in violation of rules which justify him in going upon the premises and working them."

English vs. Johnson, 17 Calif. 108, 119.

And to the same effect is:

Tunnel Company vs. Stranahan, 20 Calif. 210.

Hess vs. Wender, 30 Calif. 349, 355.

SECTION 292. "Possession is presumptively evidence of title, but it must be actual. By 'actual possession' is meant a subjection to the will and dominion of the claimant."

Hess vs. Wender, 30 Calif. 349, 356.

Coryell vs. Cain, 16 Cal. 567-573.

"It is enough when the claim is sufficiently marked upon its boundaries to give notice to others of the extent of their claims. What the mode shall be by which to give such notice is generally regulated by miners' rules of the district, but in the absence of any such rules, or the customs of miners in the particular district, we must apply the general rule, which is that the boundaries of the land claimed for mining purposes must be indicated by such distinct physical marks or monuments as will fairly ad-

vertise to all concerned where and what it is. Or, in other words, its extent."

Hess vs. Wender, 30 Calif. 349, 357.

SECTION 293. "Where Plaintiff owned a private tract of land adjoining public land, and for years had used both as a pasture for his cattle, both together being enclosed in part by fences and in part by natural barriers, but had no entry or filing on the public land."

Defendant entered peaceably and without force, and also without Plaintiff's consent on the public land, made homestead filing, and thus connected himself with the Government title, as far as he could.

HELD: Upon review of the authorities, that Defendant's entry was unlawful; that he was a trespasser and acquired no rights.

Goodwin vs. McCabe (Calif.), 17 Pac. 705.

SECTION 294. The case of *Rourke vs. McNally,* 33 Pac. 62, was very similar in its facts to that of *Goodwin vs. McCabe,* public land enclosed with brush and wire fence and natural barriers, used for pasturage. Defendant entered without force through a breach in fence made by another, and tried to homestead the public land, which was open for homestead entry, and built a house.

HELD: Entry unlawful, and no rights acquired by Defendant.

SECTION 295. In *Brown vs. Killabrew,* 33 Pac. 865, Plaintiff purchased from one Metcalfe his improve-

ments and possessory rights on unsurveyed public lands; then leased out the premises to his son, and left. Never lived on the land. Defendant entered and tried to put an entry or filing on the land, which was public land open to such entry.

HELD: He could not trespass on Plaintiff's actual possession, and his entry was naught.

Possession defined: "A subjection to the will and dominion of the claimant, "by occupation, enclosure, or any appropriate use.

Nickals vs. Winn, 17 Nev. 188-193, 30 Pac. 435, was much similar in facts to either of the last three preceding cases, and was decided in the same way.

SECTION 296. "In *Ewing vs. Burnett,* 11 Pet. 41, 9 L. Ed. 624, it was held that neither *actual occupancy* nor *cultivation* was necessary to constitute *actual possession;* that where the property is so situated as not to admit of any permanent useful improvements, and the continued claim of the party has been evidenced by public acts of ownership, such as one would exercise over property he claimed in his own right, and would not exercise over property he did not claim, such possession is sufficient, and will ultimately operate as a bar under the statute of limitations; what acts may or may not constitute possession are necessarily varied, and depend to some extent upon the nature, locality and use to which

property may be applied, the situation of the parties, and a variety of circumstances, which have necessarily to be taken into consideration in determining the question."

Simmons Creek Coal Co. vs. Doran, 142 U. S. 417, 35 L. Ed. 1063.

SECTION 297. (*E*) *Constructive possession.* The reverse of the rule we are now considering is, that wherever the possession of an owner or claimant of a mining claim is only constructive in law, and not actual as denoted by his presence or his works on the ground; or where it is only such possession by implication, as the law imputes by virtue of his recorded location or other paper title, then it is open for other parties to question the sufficiency of his acts of location, and if there is any flaw or defect therein sufficient to invalidate, they may lawfully enter upon the ground, hunt for and make mineral discoveries and junior mining location upon the ground, and under a complaint charging the specific defects or invalidating facts may prove them, and thus defeat the prior location by their new and valid location.

With such a rule we are not concerned in this case, because the facts do not show constructive but actual possession, and there is no complaint charging defects, in our lode locations. In addition the matters presented by chapters II, III and IV, which make our lode claims irrebuttable But the existence of a rule permitting entry in one case and denying it in the other,

illustrates in clear outline the validity of our lode claims, and the invalidity of their junior claims, under the facts of this case.

SECTION 298. The following cases show application of the rule to cases of *actual possession* under prior claim of location as against junior attacking location.

Greer vs. The Bank, 98 Fed. 680.

Moffat vs. Blue River G. E. Co., 33 Colo. 142-7; 80 Pac. 139.

Kirk vs. Meldrum, 28 Colo. 453; 65 Pac. 633.

Lozar vs. Neill, 96 Pac. 343-4-5.

McWilliams vs. Winslow, 34 Colo. 342; 82 Pac. 538.

Cheeseman vs. Hart, 42 Fed. 102.

Lelande vs. McDonald, 13 Pac. 347,

while the following cases show application of the rule to cases of *constructive possession* only in the prior locator or claimant.

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735.

Dev. Co. vs. Olmstead, 103 Fed. 568-573.

Malone vs. Jackson, 137 Fed. 878-81.

Johanson vs. White, 160 Fed. 901.

Phillips vs. Smith, 95 Pac. 91-92.

We might add to this list indefinitely, but it is unnecessary.

SECTION 299. The doctrine of the cases is that actual presence of the owner is not necessary to constitute actual possession, so long as he exercises acts of dominion and control over and upon the property such as an owner usually exercises on his own property and will not exercise upon the property of another, and such as its nature and character admits of. In case of agricultural land, enclosure by a fence denotes actual possession. In case of mining lands, fences are useless and inappropriate, but actual possession is denoted by such works as roadways, excavations, houses, tools, etc., as are adapted to use thereon, or by the presence of the owner's agent upon the ground.

SECTION 300. Wherever the courts have let in the second locator to locate on the ground, they have carefully pointed out that the possession of the prior locator was constructive merely and not actual, and in case of defective paper title, the junior might enter peaceably and locate. Thus in *Belk vs. Meagher,* 104 U. S. 279; 26 L. Ed. 735:

"He (Belk) had no right of possession and was only *on the land at intervals.* He apparently exercised no other acts of ownership than every explorer of mineral lands of the U. S. does, when he goes on with pick and shovel to search for and examine lodes and veins. In two months' time he put in only two days' time on the claim. And this was the extent of his possession."

And in *Saxton vs. Perry,* 107 Pac. 281, 284:

"The proof is undisputed that at the time the Nevada placer was located, *no person* whomsoever was in the *actual possession* of any part of the Wells placer.

"So that the most the Defendant could claim was *constructive possession,* and to make that effectual against one who seeks to re-locate the ground, the location under which such claim is asserted, must be valid."

And *Omar vs. Soper,* 18 Pac. 447:

"Title to a lode in the actual possession of parties who claim to own it, and engaged in developing it, cannot be initiated by other persons by survey and the record of a location certificate."

SECTION 301. *Objections, exceptions, and assignments of error.* There was a jury instruction given by the Court at variance with the foregoing rule of law as applied to the facts of this case, to which we excepted, and the same is assigned for error and treated in Secs. 598-590 hereof.

SECTION 302. At a preliminary stage of the trial we interposed an objection to any evidence pertaining to their mining re-location of the discovery of mineral thereon until it were first shown that the ground was at the time thereof vacant, unoccupied and unappropriated public land of the United States. The Court sustained this objection as a proposition of law, but overruled it in practice, saying he would allow them to prove

their case in their own way. To this we excepted, and to all of that line of testimony. (Record, p. 227.) And they were allowed to proceed and make proofs of their locations, as stated in the Assignments of Error, without such proof of vacancy, etc., of the ground, either preliminary or at all, but on the contrary testifying to sufficient facts to show that such was not the case, and that the land was not public. Our proofs supplementing theirs, showed title in ourselves, both under U. S. Rev. Stat., Secs. 2332 and 2320, as shown in chapters III and IV hereof.

SECTION 304. It was error therefore to admit their proofs of location, since they are not authorized by law to make a mining location upon the mining lands of another, but only upon public lands of the United States. The errors based upon the admission of this evidence or proofs upon their part are presented in our Assignments Nos. 2, 3, 4, 5, and 6 (Secs. 631-634, *post.*)

It is unnecessary to do more than refer to the record pages on which these objectionable proofs appear (and they are cited under each of those assignments), since they will not dispute making them, for that would be to abdicate any contentions at all in this case.

SECTION 305. But the admission of the evidence and proofs as to the acts of location of the Davis claim, without such proof of vacancy, unoccupancy, etc., of the ground as public land, but the undisputed and uncontradicted evidence showing the contrary, did not make the

Davis re-location valid. The Davis claim remained invalid and void because of such encroachment on the private lands of another, notwithstanding the admission against objections of proof of their void and ineffectual acts of location. In other words, our point is that a void and ineffectual act does not become valid by the admission in evidence of the acts constituting the invalidity. And a verdict or judgment resting thereon is upon insufficient evidence or no evidence, and is against the law. See Coughran vs Bigelow, p. 600. post.

We objected to the insufficiency of Plaintiffs' own proofs in this respect by our motion for non-suit, as set out in Assignment No. 28, paragraph 1, Sec. 655, of this Brief, to which reference is made without repetition here. Non-suit discussed in Secs. 510-520, *posts*.

We objected to the insufficiency of all the evidence on both sides in connection with such proofs of the acts of location of the Davis claim, and error is assigned thereon in Assignment No. 41, paragraph 1, Sec. 673, of this Brief. This was quoted and considered in the preceding chapter.

We excepted to the verdict as against the law for the same reasons and grounds. See Assignment No. 60, paragraph 1, Sec. 692, *post*.

We excepted to the judgment as against the law for the same reasons and grounds. Assignment No. 61, paragraph 2, Sec. 693, *post*.

SECTION 306. We need make no special citation to the proposition of law, that a junior location upon ground occupied by a senior location is invalid and void, and no right of possession is acquired thereby. They are cited abundantly in the preceding chapters. We will only repeat two of such citations here.

Belk vs. Meagher, 104 U. S. 279; 26 L. Ed. 735.

Ely Min. Co. vs. Clipper Min. Co., 194 U. S. 220-230; 48 L. Ed. 944.

SECTION 306a. *Relief asked.* We ask the Court to hold that upon the undisputed and unconflicting evidence, Plaintiff in Error's grantor was in actual possession of the Salt Lake No. 3 ground under claim and color of title at the time of the attempted junior location of the Guy Davis placer, and that the locators of the latter were trespassers on the ground, and acquired no rights therein; that the judgment be reversed, their adverse rejected, and Plaintiff in Error adjudged to have the exclusive title, possession and right of purchase and patent.

CHAPTER IX. THE EVIDENCE.

Insufficiency of the evidence to prove a cause of action in failing to prove any *ouster or detention* of the premises in question, wrongfully or otherwise, from the Plaintiffs by the Defendant, as basis for recovery thereof in ejectment or an action at law.

Section

(A) No Proof of Ouster or Detention.....307
(B) Assignment of Error 308
(C) The Evidence 309
(D) Plaintiffs' Possession, None.....311
(E) Actual Physical Ouster or Detention, Necessary 314
(F) Contentions of Defendants of Error..316
(G) Constructive Ouster 317
(H) Relief Asked 319a

SECTION 307. (*A*) *No proof of wrongful ouster or detention.* We have shown in chapter VII, Secs. 238 to 268, inclusive, that it is necessary for Plaintiff in an action of ejectment or for possession of a mining claim to both allege and prove actual, physical, unlawful ouster of the Plaintiffs from the premises by Defendant, or at least actual, physical, wrongful and unlawful detention from the Plaintiff of his premises at the time the action

is begun. But if he fails to allege this necessary fact in an action at law, it cannot enlarge his rights in the matter of a failure *to prove* that fact. Whether the failure to prove a necessary fact arises from absence of evidence of the fact, from negligence or inattention, or from failure to previously allege it, it is the same in its effect on Plaintiffs' success in the suit. He can not have or retain a judgment which the evidence does not entitle him to.

SECTION 308. *Assignment of error.* We assign as error.

Assignment No. 41. (Sec. 673, post.)

The Defendant assigns the following grounds of insufficiency of the evidence to support or justify the judgment and verdicts herein.

16. This action was begun and prosecuted as an action at law, for possession, in the nature of ejectment, but the evidence does not show ouster of the Plaintiffs, wrongful or otherwise, from the ground by the Defendant.

17. The evidence does not show a wrongful or unlawful detention on the ground from the Plaintiffs, by the Defendant, at the time of the beginning of the action, nor at all.

18. The evidence shows that some of the Plaintiffs never were upon the ground, and that none of the Plain-

tiffs were ever in the possession of the ground ,but that some of the Plaintiffs made transient, unlawful and secret intrusions upon the ground without the Defendant's knowledge or consent.

Assignment No. 60, paragraph 1 (Sec. 692), already quoted, continues the same challenge to the sufficiency of the evidence, and because the verdict is against the law, on the same grounds.

Assignment No. 61, paragraph 2 (Sec. 693), already quoted, continues the same objection, and that the judgment is against the law for the same reasons and on the same grounds specified in Assignment No. 60.

(C) THE EVIDENCE.

SECTION 309. The Plaintiffs did not attempt to make any proof of this nature. The facts as to the date and continuity of Defendant's possession of the ground appear in the previous Secs. Nos. 115-119, 171-173, 179, 221, 275-279 of this Brief, and citations therein to the record. Testimony as to the presence, residence and working on the Salt Lake No. 3, Midas, and Evening Star and the other units of the Canyon group appears throughout the record and is undisputed at any point by Plaintiffs. Reference is made especially to Record,

pp. 568-9, 607-8, 624, 644-6, 654, 666-9, 730, 752, etc. Thus Joseph Jurey testifies:

Have lived in Copper canyon 16 years, since May, 1898, except I lived in the basin one year, 1914, men were living in the canyon in 1914, I know. From 1898 I have been employed as miner, caretaker and foreman, working for the Glasgow & Western Exploration Company, who were the owners of the Salt Lake No. 3, Midas and Evening Star and other claims. I lived in a little cabin on the Salt Lake No. 3; also my brother, and at times 10 to 20 other men. They used to work a while, then shut down a while; the pay rolls of the last 10 years will show all that. I have been foreman for 10 years, or ever since 1906 or 1907.

SECTION 310. The witness testified to the work done on the mining claims from time to time ever since 1897 or 1898 down to the trial of 1915, as shown in the abstract of the evidence in Secs. 171-173 hereof. On Record, pp. 644-688 this testimony largely appears. On Record, pp. 651-3, Jurey tells of the placer discoveries by Defendant in 1913 before either of the conflicting locations. He says:

I have lived there in the houses on Salt Lake No. 3 since 1898, except in 1914. Boundary monuments are the same now as in 1898; been no change. Last saw them about a month ago, no change.

I have to go around the boundary monuments every once in a while to see that they are up and in place.

Plaintiffs' counsel admitted in open Court that all the boundaries were up and in place at the time they located the junior locations under which they claim.

Identifies the pay rolls covering wages paid every month since some time in 1898, amounting to over $100,000, and knows the handwriting of the men signing. Pay rolls themselves offered in evidence but rejected by the Court.

And Plaintiffs' counsel admitted that all annual labor had been kept up and performed, and there was no forfeiture (p. 394), and the Court took that question from the jury (p. 837).

The boundary monuments of the Salt Lake No. 3 lode claim were in place, showing the limits of the claim, and were seen and known to the locators of the Guy Davis prior to and at the time of their location.

Healey, p. 301; Ray, p. 258; Phillips, pp. 320 and 324.

Their counsel's admission in open Court, pp. 977-8 and 1202.

The Court's instructions, pp. 1225-6.

We need not recapitulate all the evidence as to our possession under the lode claims. We have already cited it all to the record. See Sec. 309 post, 115-121, 170-173

(D) PLAINTIFFS' POSSESSION, NONE.

SECTION 311. Now, let us see what, if any, possession Defendants in Error and their grantors ever had, when it began and when it ended. And whether we ever wrongfully or unlawfully interrupted such possession, or wrongfully detained from them.

The Salt Lake No. 3 location was made by Guy Davis and Noah Faubert as locators. See their location notice and certificate. Record, pp. 236-7.) Noah Faubert did not testify, and is not now a party to the suit. Guy Davis barely appeared on the witness stand to answer two or three questions. (Record, pp. 263 and 399.) So nothing was proved by them as to possession or ouster. D. S. Van Orman testified for them that he performed the location work and acts of location for the Davis claim upon the ground, beginning on Sept. 7, 1913 (which was two days after their location notice), including the pretended discovery of mineral (Record, p. 227), and did their discovery work in sinking the shaft No. 8 on their map, Exhibit "A" (see map, Sec. 8, *ante*.) This shaft was on the hillside formation on Salt Lake No. 3 ground (map, *ante*), size 4x6x10 feet. (Record, pp. 228-9). After that no further work was done until Oct. 1, 1913, when a shaft 57 feet deep in the wash or bottom of the canyon

was begun and finished about Oct. 20, 1913 (Record, pp. 229 and 248, and they worked from then until Nov. 26, 1913, and took out about $1000 in placer gold from that 57-foot shaft (Record, p. 230), which is shaft No. 9 on map. We got four shafts to bed rock on this claim (Record, p. 231), average 50 feet, deep, deepest 57 feet, exposing pay gravel. Aside from shaft No. 9, they were commenced about Oct. 20, 1913, except the one on the line of the Comet claim, done in August; the other shaft by myself, Davis and Faubert and one by Sheehy and Williams. They were all completed before Thanksgiving day, I judge about 24th or 25th of November, 1913 (Record, p. 248). Commenced about Oct. 20, 1913, and finished about Nov. 27 or 28, 1913 (Record, p. 250), completed before Nov. (Dec.) 1, 1913.

Q. After you located this claim and did the original discovery work, what did you do with reference to staying on the claim or going away?

A. I was living on an adjoining claim.

Q. And when again did you do work on the Guy Davis claim?

A. I have never done no work since the 26th day of November, a year ago (1913). (Record, p. 251.)

I commenced the discovery work on the Guy Davis about Sept. 7, 1913, and completed it in about three days. (Record, p. 251.)

SECTION 312. The above in Sec. 311 is all there is in the record indicative of any acts of possession or presence on the ground by the Defendants in Error, their grantors, or any of them, so far as the Salt Lake No. 3 ground, designated by them the Davis claim, is concerned. There was no testimony as to their being put off the ground, or kept off by the Defendant (Plaintiff in Error), either at the time of the beginning of this action, or any other time. On the contrary, their complaint in paragraph I, by which they are bound, alleges:

"That ever since the ..... day of September, 1913, Plaintiffs and their predecessors in interest were the owners of and in actual possession and occupation of the Guy Davis placer mining claim, 900 feet in length by 600 feet in width, said claim being situate in the Battle Mountain mining district, county of Lander and state of Nevada, and Plaintiffs ever since have been and now are the owners of and entitled to the possession of said mining claim."

And their location notice and certificate dates their discovery and location of the Guy Davis re-location on Sept. 5, 1913 (Record, pp. 236-7), and construing their complaint in the light of their location papers the blank in the first line, *supra*, would be filled out with "5th," and the result is an uninterrupted possession by them of the ground from and after Sept. 5th, 1913, to the time of filing their complaint on Sept. 30, 1913. (Record, p.

20.) And this precludes any proof, or theory that they intended to prove interruption of their possession, ouster or detention, wrongful or otherwise by the Plaintiff in Error, Defendant below.

SECTION 313. But this condition of allegation and proof is inconsistent with the verdict and judgment which attempts to take and restore the possession to them from the Defendant. (Record, p. 35.) It is further inconsistent with the nature of their action in ejectment to recover possession and damages. See prayer of the complaint. (Record, p. 18.)

(E) ACTUAL PHYSICAL OUSTER OR DETENTION, NECESSARY.

SECTION 314. *The following citations are pertinent*:

"As Sec. 910, U. S. Rev. St., prescribes that the 'case shall be adjudged by the law of possession,' *the Plaintiff cannot prevail against the Defendants,* if they had *prior possession under color of title,* and did not by actual force *oust him of actual possession.* In this action the struggle is *for possession only,* and the parties cannot have a judicial determination of the question as to which shall ultimately prevail in a contest for the title."

Bevis vs. Markland, 130 Fed. 227.

"The Plaintiff does not pretend that there is any evidence to sustain the allegation in his complaint that he was wrongfully ousted of possession by the Defendants. They have not by force or intimidation molested him, and they have not interfered with the possession of the Plaintiff or his grantor, otherwise than by continuing to hold possession in the same manner as before the attempted location of the Pioneer placer claim. Therefore, it is essential to his success for the Plaintiff to prove that the Defendants are mere intruders, having no color of title or right to possession."

Bevis vs. Markland, 130 Fed. 226.

SECTION 315. "It is a general rule that ejectment can only be maintained by one out of possession. Primarily, therefore, it must be shown that the Defendant keeps the Plaintiff out of possession unlawfully, or that there is an ouster, disseizen or dispossession, actual trespass or tortious entry, as well as wrongful possession."

15 Cyc. 53.

"Ejectment only lies against a Defendant in possession or occupancy at the time when the action is commenced."

15 Cyc. 54, note 69-70.

"As a general rule, ejectment being a possessory action, it cannot be maintained for land of which Plaintiff is in possession, but it must be affirmatively proved

that there has been a disseizen of the Plaintiff, as well as a wrongful possession by Defendant."

27 Cyc. 642, note 8.

SECTION 316. *The Nevada Revised Laws,* 1912 define wrongful ouster and detention as follows:

"Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstances of terror, enters upon or into any real property; or

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in natural possession."

Rev. St., Nev., 1912, 5586, Sec. 644.

"Every person is guilty of a forcible detainer who either:

1. By force, or by menaces or threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or

2. Who in the night time, or during the absence of the occupant of any real property, unlawfully enters the residence, and who, after demand for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property, within the meaning of this subdivision, is one

who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands."

Rev. St., Nev., 1912, 5587, Sec. 645.

(F) CONTENTION OF DEFENDANTS OF ERROR.

SECTION 316*a*. *Contention of Defendants in Error.* They contend that actual ouster is not necessary to be alleged or proved, and that mere temporary presence by Defendant on the ground, or no presence, at all for that matter, coupled with an assertion of an adverse title or claim to the ground, is sufficient as ouster to support an action at law for possession.

This is wholly incorrect, except as to vacant, unoccupied and unimproved ground that is not in the actual possession of either party to the suit. In such cases it is recognized that as there is no actual possession, there can be no actual dispossession or detention. But the subject of this action is ground that has been actually improved, occupied and possessed by the Plaintiff in Error and his grantors for a great many years, as we have seen, and it was so when Defendants in Error and their associates appeared on the ground, in response to news of the rich gold strike the owners had found on the ground. This possession was denoted by the owner's valuable build-

ings, mill, tools, roadways, machinery, boundary monuments, performed assessment work, and personal presence and residence on the ground of the owner's agent and caretaker, engaged in keeping up all the boundary monuments, and looking after all his property. These acts of possession extended to and over each and all the units of the Copper Canyon group, as to which his employment related, as also did the constant performance of all assessment work upon each of the claims. All these things stood for the possession in fact of the owner, and were articulate of his presence and peremptory in its notice to trespassers to keep off. It was not an ouster of trespassers who had never been lawfully upon the ground, any more than the law constantly ousts all unauthorized persons from the private property of its citizens. Nor was it a "wrongful detention" from persons who had never had or become entitled to possession. Nor did it become otherwise upon their unauthorized and criminal intrusion upon the ground.

(G) CONSTRUCTIVE OUSTER.

SECTION 317. *Constructive ouster.* In 15 Cyc. 54[illegible]. there is an allusion to cases of this kind, where it is said that actual or personal possession, occupancy or residence are unnecessary to constitute ouster, but that

a claim of title may in some cases be sufficient, although Defendant is not in possession. But an examination of the cases cited by the text shows that they were in each instance cases where neither party had been in actual prior possession, but Plaintiff had title which was constructive of possession in law, and the Defendant thereupon entered by means of his agents, buildings, tenant, or other representative on the ground under assertion or claim of right. Or else, in two or three of the cases, there was a provision in their state statutes providing that possession is unnecessary in ejectment; which is a commingling of law and equity procedure giving one remedy for invasion of real estate, whether such invasion be manifested by entry or adverse claim. Neither the facts nor the law of those cases obtain in this.

SECTION 318. In 15 Cyc. 56 another statement of the same rule as to wild or unoccupied land.

"Ejectment will only lie against one out of possession, claiming title, when the lands are unoccupied, and his claim of title or of interest is accompanied with acts of ownership, such as enclosure, cultivation and the like.

The oldest and best title will prevail where lands are unenclosed and unimproved, or are wild or unoccupied, and not in the actual possession of either party."

15 Cyc. 56.

But possession and improvement prevent mining ground being subjected to a location as wild and unoccupied ground.

Ware vs. White, 108 S. W. 831-3.

But in view of the decision of the U. S. Supreme Court in the case of *Lumber Co. vs. Lumber Co.*, it is probably true that the rule as to wild and unoccupied lands and constructive ouster does not apply in the Courts of the United States. For it was there held:

"When lands were wild and unoccupied, it had been held that the Federal Courts in chancery could entertain suits to quiet title in the rightful owner. But in such cases, a Court of law could afford the owner no remedy, and therefore there is no right to a trial by jury, since such right existed only in cases at law. It is, therefore, no violation of the constitution or statute, to bring such suits in equity. But when lands are unlawfully occupied, the owner can sue the occupant at law, and the consequent right to trial by jury exists."

Lum. Co. vs. Lum. Co.

(Note: The correct book and page of this citation has become lost through copying.)

And:

"A right of action of a claimant of a mining claim who is out of possession against another in possession, concerns possessory rights, the title being in the United States, and his remedy is at law."

Davidson vs. Calkins, 92 Fed. 230.

SECTION 318a. And as stated before, the Plaintiffs have alleged in their complaint, paragraph 1, that they have been in possession ever since they located. And in presence of that allegation, there is no room for discussion as to either an actual or a constructive ouster. They have not been ousted at all, but have already in possession that which they seek in the lawsuit. The trouble is they are trying to warp their complaints into a state of facts their structure does not admit of, by process of mental legerdemain.

SECTION 319. They say we did not demur before the trial. An omission to allege a material fact, may be taken advantage of at any time, even on motion for new trial or appeal. But we raised it by objection to evidence, motion for non-suit, exceptions to the verdicts and exceptions to the judgments.

They say our answers do not deny that the Defendant is, or was at the commencement of the action, in possession of the ground in controversy. Of course not. They did not even allege that fact, so there was no occasion to deny it, or admit it, either. The only averment tendered us was one charging that they, the Plaintiffs, were in actual possession, not Defendant.

SECTION 319a. *Relief asked.* For the insufficiency of the evidence pointed out in this chapter, the judgment should be reversed, and remanded, subject to the relief asked under other chapters hereof.

CHAPTER X.

MINERAL DISCOVERY IN THE LODE CLAIMS.

		Section
(A)	Reservations Concerning Inquiry as to.....	320
(B)	Assignments of Error and Evidence.....	322
(C)	Rule as to Prudence in Locating.....	333
(D)	Burden of Issue and Proof on Junior Locators	349
(E)	Opinions Without the Physical Condition as to Veins or Lodes.....	363
(F)	Panning as a Means of Ascertaining Values..	378
(G)	Pay Ore and Commercial Values as a Test of Veins	385
(H)	Testimony by Plaintiffs witnesses as to the Physical Indicacia of Veins and Lodes.....	408
(I)	Comparison of Testimony for Plaintiffs and Defendants as to Veins and Lodes.....	420
(J)	The Testimony Considered with Reference to the Rule as to Conflicting Evidence.....	432
(K)	Subsequent Mineral Discoveries to Original Locations	444
(L)	Synonims for Lodes and Veins as used by Plaintiffs' Witnesses	445
(M)	Character of the Country Rock.....	450
(N)	The Alleged Discovery Monuments.....	455
(O)	Purpose of Requirement of Mineral Discovery	480
(P)	Mining Operations	482
(Q)	General Insufficiency of Plaintiffs' Evidence as to Mineral	486
(R)	Relief Asked	492

(S) Abstract of Plaintiffs' Testimony as to Mineral or Mineralized Conditions..... 493
(T) Abstract of Defendant's Testimony as to Lodes, Veins and Mineralized Conditions, etc. 502

SECTION 320. (A) *Reservations Concerning Inquiries as to Etc.* Notwithstanding, as we have shown, that the subject of mineral discovery in our lode claims was not a subject for inquiry in this case, and that inquiry in regard thereto by defendants in error, Plaintiffs below, was barred at the trial, by their absence of title or interest in the subject matter, by the operation of adverse possession and limitations under U. S. Rev. Stat. Sec. 2332, by their failure to allege want of discovery as a ground of invalidity, (Chap. 2, 3, 4 ante), and the other matters set out in preceding chapters which barred the way, the Plaintiffs below were permitted to put in evidence certain testimony for the assumed purpose of invalidating the prior lode claims on the ground of no mineral discovery therein and thereon to have verdict and judgment.

SECTION 321. We resisted this evidence first by objection to the introduction of any evidence because the complaint does not state facts sufficient to constitute a cause of action (Record p. 213) and assign as error the action of the court overruling us, under Assignment No. 1, paragraphs (a) and (e) (Sec. 630 post).

By objection to the specific evidence as offered

under Assignments Nos. 7 to 16, inclusive. (Secs. 636-645 post.)

By motion to strike out all their testimony as to absence of lodes or their inability to find lodes upon or within the Salt Lake No. 3 lode claim, as immaterial, irrelevant, insufficient and inadmissible, and because it does not follow or tend to prove any of the averments of the complaint; Assignment No. 27. (Sec. 654 post, Record p. 526-533.)

By motion for non-suit under Assignment No. 28, Paragraphs 1, 2, 5 and 8. (Sec. 655 post, Record p. 527-531.)

By exceptions to the insufficiency of the evidence to support or justify the verdict, under Assignment No. 41, Paragraphs 1, 4, 5, 6, 20 and 21. (Sec. 673 post, Record p. 1243-4.)

And exceptions to the verdict and judgment for the same reasons under Assignment No. 60, Paragraph 1, and No. 61 Paragraphs 1 and 2. (Sec. 692 post, Record p. 1243-4.)

We will treat each of these assignments severally at greater length hereinafter, if there is time and space, but their substance is preserved and included in our exceptions to the sufficiency of the evidence to support or justify the verdict or judgment, under Assignment No. 41, Paragraphs 6, 20 and 21. (Sec. 673 post.)

(B) ASSIGNMENTS OF ERROR AND EVIDENCE.

SECTION 322. *Assignment No.* 41. (*Sec.* 673 *post*). Defendant assigns the following grounds of insuffi-

ciency of the evidence to support or justify the judgment or verdicts herein:

6. That said relocation of the Guy Davis claim, Occurred on September 5, 1913, and that several alleged examinations and searches for lodes or veins by Plaintiffs' witnesses and said relocators, occurred at or about the time of the relocation, some of them after the relocation had been in fact made or filed, and was done in hostility to the prior Salt Lake No. 3 lode location, in the effort and for the purpose of depriving the owner thereof, and not to sustain the same; and were done nearly 17 years after the time of the location of said Salt Lake No. 3, and without any knowledge on the part of said witnesses of the original physical facts of said Salt Lake No. 3 lode location, or of the original mineral showings thereon, or mineral disclosures subsequent thereto, affecting the title to said Salt Lake No. 3, and without any effort to ascertain the same.

20. There was no lawful evidence to show that a discovery of a vein or lode of mineral bearing rock in place, sufficient to sustain the Salt Lake No. 3 lode location, had not been made therein, prior to the time of the alleged Guy Davis relocation on September 5, 1913.

21. The evidence shows sufficiently and affirmatively that such discovery had been made in said Salt Lake No. 3 lode mining claim prior to the attempted relocation thereof, under the Guy Davis claim.

SECTION 323 *Their Evidence* as to Discovery is collected and set out in an Addendum to this chapter, Sec. 493-501 hereof. In considering its sufficiency to sustain a verdict or judgment, we will discuss it as though it were rightfully in the record, but we in no manner waive our objection that it was not within the issues; that the inquiry was barred by limitations under U. S. Rev. Stat. Sec. 2332 (Chapter III hereof); that Plaintiffs below had no interest (Chapter II hereof), or that in default of an issue charging invalidity of our lode claims in their complaint, the lode locations no matter whether otherwise *prima facie* or absolute are conclusively valid against them (Chapter IV), nor any of the other fatal insufficiencies of their complaint and proofs elsewhere treated herein.

SECTION 324. It is beyond cavil that the allegata and the probata must agree, and either one without the other is insufficient. And a failure by a junior loctor to allege in his complaint attacking a senior location, the want or absence of a mineral discovery precludes any proof on that subject at the trial.

Russell vs. Hoyt, 2 Pac. 25.

Infra secs. 191-194, 198-199, 203-206, 349-3

SECTION 325. We further call attention to the recent decision of the Supreme Court of California, in the case of Hullinger vs. Sespe Oil Co., 151 Pac. 369-70, column 2, holding that the question of the existence of a mineral discovery in a mining claim is one for the United States Government, and not for others.

SECTION 326. *Grouping the Testimony.* But to proceed, in considering our opponents' testimony or

evidence given for the purpose of questioning the insufficiency of our lode claims, to determine its sufficiency or insufficiency to sustain the verdict or judgment, it will facilitate our purpose to take group or classify the testimony separately according to the objections to be made against each class or character of testimony. The first class is that represented by the following, and the court will see it runs right through their testimony.

SECTION 327. *D. S. Van Orman testified for Plaintiffs*:

Rec. Page

226 Lived in Copper Canyon in August—November, 1913.

232 Q. Did you ever go over the ground to see whether there were any lodes or veins exposed on it? A. Yes.

Q. Did you find any? A. None whatever.

Q. Did you go over it carefully with that in view?

A. Yes, sir.

Q: What was your conclusion with reference to the ground after going over it?

A. Well I concluded that—

(Objection to conclusion of witness.)

THE COURT: Well, he didn't find anything, that is the fact? A. Yes.

Rec. Page

237 Q. You state you went over that ground now within the limits of the Guy Davis placer pretty carefully? A. Yes.

Q. Were you able to discover anything on that in the nature of a vein or lode? A. There was nothing outside of chemically stained quartzite. That country had the appearance on first sight of being mineralized, which proved to be barren on investigation.

Q. Did you pan it? A. Yes.

Q. Did you find anything that would justify you as a miner or reasonable person in developing it? A. No, sir.

Q. That is within the boundaries of the claim as a lode claim? A. As a lode claim, I did not.

***SECTION* 328. *L. O. Ray testified for Plaintiffs*:**

253 Summer and fall 1913 resided in Copper Canyon.

256 Q. Did you go over the Salt Lake No. 3—Guy Davis placer? A. Yes.

Q. How thoroughly?

A. I have been all up and down the gulch and around where the mill is, there may be portions on the NE corner of the Salt Lake No. 3 up above, that I have not been on; outside of that, have been very well over it.

Q. Did you examine this Salt Lake No. 3—Guy

Rec. Page

Davis placer with reference to ascertaining whether there were any lodes or veins showing on it?

A. I never saw anything—(objection).

Q. Did you examine it? A. I did, to a certain extent.

Q. For that purpose? A. I did.

Q. What did you find?

257 A. Well up on the road above the mill, and up on the hill, on the north side of Salt Lake No. 3, where the formation shows, there is seams that would indicate that there might be mineral in it, but I found nothing that would indicate a lode there; or, in other words, the Company has spent its big money on the other claims instead of doing the work there.

Q. Did you do any panning in hard rock? A. No I did not.

259-60 I made no chemical or field tests. The placer shafts are the only ones I saw or examined. I never examined them for vein or lode; examined the gravel at bed rock; no veins or lodes in those I have been in; in the others I don't know.

I examined the outcrops near the mill; that is where I said there were fractures and seams that might have ore.

260 Miners disagree on what is locatable; one passes up what another will locate. Always differences of opinion, etc. Experts even disagree.

Rec. Page

I did not pan the fractures and seams. Could not testify they do not carry values.

SECTION 329. J. J. Healey testified for plaintiffs:

271 I went into Copper Canyon about July 7 or 8, 1913.

289 Yes, am familiar with the ground covered by the Salt Lake No. 3—Guy Davis placer; been over the ground many times; prospected the ground; found colors several places.

294 Q. Have you been over that ground since? A. Yes, sir.

Q. And have you prospected it since? A. Yes.

Q. In you examination of that ground is there anything on it which in your experience as a miner you would call a lode? A. No, sir.

294 Q. Did you find anything in the nature of a lode or vein which would justify exploration or work?

A. No, sir.

CROSS-EXAMINATION.

297 If evidence were produced showing $7 or $8 assays from any of those workings it would not change my opinion as to the lode values.

303 I didn't clean out the cuts to see if they were in mineral or vein matter.

Those locations looked like they had been made 20 years.

Rec. Page

SECTION 330. *W. J. Moran testified for plaintiffs:*

351 I went over the ground the other days when making my survey, yes. I examined the cuts and opening on the ground, and cut 28 a shallow exca-
353 vation on the ground, and there are quite a number of other excavations.

354 I examined in and around the mill to see whether there was a lode or vein; found none, no.

Q. I want to ask you, in these various openings that you looked at on the ground, did you find in any of those openings anything in the nature or form of a vein or lode, which you would consider as such?

A. No, sir.

My answer refers to the Salt Lake No. 3.

See qualifying testimony as to values sec 388 post

SECTION 331. This sort of testimony is wholly insufficient to base a verdict or judgment on the theory of no former discovery in the lode claims. As the court remembers, the Salt Lake No. 3 was located February, 1897 (Secs. 115-119 ante) and came down to Plaintiff in Error by successive conveyances. The acts of location and discovery were done at that time, not in the fall of 1913. And any testimony designed to question either, must be directed to the time, place, and physical conditions on which the Salt Lake No. 3 purports to rest. This means February 2, 1897, not the fall of 1913, and relates to the acts of J. H. Clive, the locator,—not the acts or doings of Van Orman, Healey, Ray, et al, many years later and after valuable placer had been found,

and a *lis mota* had arisen. Every one of these men came in there on the run in the summer and fall of 1913, after news of the rich placer strike by the Plaintiff in Error in the channel or wash of the canyon which traverses one side or corner of his lode claims, had gotten abroad.

SECTION 332. Now, if the jumpers want to show that no lode or vein had ever been discovered on the lode claims when the latter were located, or later, so as to swipe the placer deposits upon our ground, let them shoulder their burden, and go back to the date when these things occurred. We are not interested, and the law does not inquire, what these fellows did or what they saw years later when they arrived, out of breath, with eyes and nerves attuned to our placer deposits. The lode locations were either valid or invalid before they arrived, and nothing they did could alter the situation any, and either lessen our rights, title and possession, or increase their own. So, let them show up what the original physical conditions were, and that those conditions did not warrant a lode mining location.

Insert

For as seen later, they admit there are lodes and veins in the ground, but demand commercial ore on the surface, and further demand that we prove its former visibility; whereas the law presumes discovery in aid of our prior locations, and calls upon them to allege and prove the contrary; provided they are not barred from that field of inquiry.

an ordinarily prudent man to spend his time in further prospecting the ground in the expectation of developing a valuable mine. This last has frequently been held by the courts in mining cases to be the inquiry in determining the sufficiency of a mineral discovery to authorize a location under U. S. Rev. Stat., Sec. 2320. Many cases to this effect wil loccur in the succeeding citations. But until you have the physical conditions and mineral indications in evidence, you cannot judge of the degree of prudence exercised in locating upon those conditions and indications. Until you have the major premise, you cannot draw the minor. And it is held that the conditions and indications in determining the prudence exercised *are those which are within the observation of the discoverer, and which induce him to locate the ground* with a view of further prospecting and developing it.

Lindley on Mines (3rd Ed.), Sec. 336, n. 47, citing:

Chrisman vs. Miller, 197 U. S. 313, 332; 49 L. Ed. 770;

Steele vs. Tanina Mines Co., 148 Fed. 678, 680;

McShane vs. Kenkle, 44 Pac. 979;

Mining Co. vs. Rutter, 87 Fed. 801, 808;

Sanders vs. Noble, 55 Pac. 1037, 1042;

Muldrick vs. Brown, 61 Pac. 428, 430;

Michie vs. Gothberg, 30 L. D. 407;

Cascaden vs. Bartolis, 146 Fed. 739, 741; 162 Fed. 267;

Lange vs. Robinson, 148 Fed. 799, 803;

Charleton vs. Kelly, 156 Fed. 433, 437;
Tunnel Co. vs. Mary Verna Min. Co., 127
Pac. 129, 132

But these witnesses not only did not know and could not testify what the physical conditions were at the time and place of the original discovery and location of these claims, but they do not even state what the physical conditions were that the jury might judge whether they saw a vein or lode. But they only state their own conclusions or opinions that what they saw did not amount to a vein or a lode which opinions are vitiated by false reasoning, as we shall see, and by their withholding of the physical facts on which they based their conclusions or opinions.

That such testimony or conclusions is legally insufficient and incompetent is shown in Secs. 342-7, 360, 335a-334c post.

That it is also logically insufficient and will not stand the test of reason, we will not demonstrate.

[illegible] disprove the existence of any such house on that ground, visits the ground today, and returns to court and swears there is no house on the ground, or that he has seen nothing that he considers to be a house within his understanding of that term. But on cross-examination he explains that he would not consider any structure to be a house within his judgment of the term as an architect, or business man, or other qualified witness, unless the same had a value

in excess say of $800 or $1000. Any structure worth less than that he would not consider to be a house at all, as its usefulness or value is too limited. With this qualification, one cannot determine anything against the accuracy or judgment or prudence of the man who presumably built, observed or occupied such a house 16 years ago,—nor yet that of his grantees who still make that contention. Value itself is a queston of judgment and discretion, and has many elements. The house may be more valuable and adaptable than a recent witness supposes (especially a witness who has designs on the property and hopes to profit by acquiring the property, if his contention that the structure is not a house be accepted). And it may be of less value to such testifying witness than it is to the owner of the property, who for his own purposes may find it quite serviceable and valuable.

SECTION 336. This illustration might very aptly apply to disturb the title of a homesteader who has built what he regards as a comfortable house and resided on his homestead for five years, and complied with the law in all other respects to earn his title, because someone with higher notions of what a house should be, testifies that what the homesteader calls a house is really not a house at all in witness' estimation, albeit, there may be a structure with walls, floors, roof, chimney, etc.

SECTION 337. And what shall we say of a witness who assumes to speak of the value of a house, a piece of land, a railroad, or any other object after he has only seen a very small fraction of it, and has not seen

the larger part which constitutes its value? Appraisement of a railroad would be a fair illustration of this. A witness goes on the railroad at one, or two or three points, and he finds, let us say, that the roadbed and track is in bad repair, and if all the railroad is in the same condition, it is a very poor road. It almost amounts to reconstruction to repair it. But what right has such witness to assume that all of the railroad is in the same condition as at the one or two places he saw? It may be in very fine condition elsewhere and in most places. But he has the same right to judge of the value of the whole railroad, or a whole tract of land, by what he saw at one or two places, as he has to judge of the value of a lode or vein by what he sees at one or two places at or near the surface. The fact that it is more expensive to open up, develop and inspect the depths of a vein to determine its value, does not alter the proposition. The law itself recognizes this, and that a vein which may not commend itself to some prospectors and locators by its appearances and indications at the surface, may on development prove to be very valuable elsewhere at or near the surface, or in its dip below the surface. This has occurred in fact so often in mining, and is still the daily experience of the mining world, that the law and the courts have in substance told prospectors, that they may go ahead and use their own judgment as to the ultimate values in a vein. So long as there are walls and included gangue matter—the matrix of the vein, made visible at the surface or by surface openings, it is immaterial what the values are at the surface,—or even if there is no values. It takes time and money,

lots of it very often, to open up a vein and obtain an exhaustive knowledge of its values, and before all this is done, the locator must have protection; hence may locate (Secs. 181-186, 369-375, 389-407). As the courts say, the locator is often influenced more by the general indication of veins in the district, and may believe from his experience there and elsewhere, that what appears to be a rather poor showing, i. e., mere seams in the rock, or fracture zones, or "stringers," with no mineral at or near the surface, is very apt to run into pay ore a little deeper in the ground, or upon its strike.

Book vs. Min. Co., 58 Fed. 107;

McShane vs. Kenkle, 44 Fed. 981.

If so, he is entitled to locate and use his own judgment in the expenditure of his money, in subsequent development. And if he does that and locates the ground, and keeps up the annual labor (Secs. 484, 594-595), he is immune from attack on the ground of no vein or lode, or no discovery. It is for the very reason that it is difficult to tell what may be in the vein lower down from the surface, that the law authorizes the locator to use his judgment about locating before he has opened up the ground and obtained an exhaustive knowledge of its values and potentialities.

SECTION 338. Having set its seal on such a location as valid (and this illustration may be taken as hypothetical), wil the law then tear down what it has built up,—take away the title it has conferred,—if forsoothe some adventurer later comes upon the ground, and with less labor than the locator has used to estimate

and determine values, comes into court and says he has not found values, and does not consider there is a vein or lode for want of values in the sample he took at the surface?

SECTION 339. As a matter of fact the question of *values* in the vein or lode, at least at any specified point at or near the surface has practically nothing to do with it, under the rules of law elsewhere set forth with citations herein. (Secs. 181-188, 389-407.) The only effect of the mention or requirement by any witness of localized values as a necessary ingredient in the existence of a vein or lode, is to take out of the case such witness testimony that he did not see any object which he would consider to be a lode or vein.

SECTION 340. (Point No. 2.) But let us suppose another case. The homesteader builds a house which may be ever so useful and valuable to him, answering every purpose and requirement of law. He resides in it and earns title. Subsequently, his house burns down or is otherwise destroyed. What was once visible, and would have based *"discovery"* of a house, if anyone had looked at it, is no longer visible, and if the question whether it ever existed or was discoverable on the ground at a period of time some years before, has to be decided by what now appears on the surface of the ground, then it is very clear that no house ever existed, and the homestead *ex post facto* has become divested of the title which he had by improvement and residence under the law.

SECTION 339a. This is parallel to the case of a

lode mining claim, where the locator actually goes on the land and discovers or makes visible a lode or vein in place, either at the surface, or very near the surface, with say a few inches or a few feet of surface dirt, gravel or "slide" from the slopes above, covering the formation generally. The vein may be entirely exposed at the surface here or there, for a few feet, inches, or yards, and at other points covered to a depth of several inches or feet. The locator may open up the surface dirt or debris and expose the vein for a few feet more in length along the vein. Having complied with the law, he stakes and records his claim. He may have a group of mining claims adjoining each other. On looking over the group, he decides on one claim as warranting first attention in development, or as perhaps inviting earlier financial returns. But either in group work or otherwise he keeps up all annual labor on all the claims. He need not do more under the law or take out any ore. (Secs. 483-485 and 594-595.) In course of time, 16 years later, let us say, the accumulating wash, debris, and accretion from the mountain sides carried down by the rains, snows and storms, gathers upon his surface and fills up the small openings where his vein was discovered, adds to the surface layer so that even the vein outcrops are covered over at the paints where formerly they were visible. This often happens. Yet obliteration of the original discovery work or other surface exposure, or of the discovery monuments or boundary stakes, subsequent to location, does not invalidate the mining claim, as we show elsewhere herein. Sec. 347 post

The locator by and by sells all his group of claims

to a good faith purchaser, for a large sum of money, and then dies or passes out of view.

SECTION 340a. Now some 16 years later, additional values, lode or placer, are discovered, and it is known the ground is very valuable. A witness or witnesses with or without pecuniary interest in destroying the locations, goes and looks on the surface or into such new openings as he may find, does not excavate the old ones to their former depth to see if they are in mineral at the bottom, and goes into court and says he has been carefully all over the ground and has not seen anything he would consider a lode or vein. Perhaps not. The case is similar to that of the homesteader's house that has burned or been pulled down and destroyed. The vein is not destroyed, but it is no longer visible at the surface, because it has been covered over with dirt washed from the mountain side, which also has drained into and partially filled the old shafts. The vein may be no longer visible now, but that is not proof that the vein was not visible 16 years ago. That the veins do exist now at or immediately under the surface of the ground on Salt Lake No. 3 is uncontradicted, and testified to at times by their own witnesses; while most of the time of our witnesses was taken with their counsel's objections and efforts to exclude their testimony showing the existence of these veins. Not with entire success, however.

SECTION 341. **But going back to our position in** Section 334, the question as to existence of a vein or lode, is a composite one, and does not relate merely to whether there is such a mineral structure as they would

consider or classify to be a vein or lode within their definition or appraisement of its value or usefulness, but it relates to the physical characteristics on or in the ground, and whether there exist the constituent factors or essentials of a vein or lode within the meaning of the federal statute, and on which a discovery and location may be lawfully made. And primarily it relates to the degree or extent to which these factors or essentials of a vein were exposed to view at the time and place where the locators saw and judged a locatable vein to exist 16 years ago,—not to what may have been or remained exposed over 16 years later when these jumpers came on the ground bent on withdrawing the ground from the owner.

SECTION 342. *Physical Factors or Ingredients of Vein or Lode.* We have made liberal citation elsewhere in this brief to the physical requirements or essentials of a vein or lode as defined by the courts, state and federal (Secs. 181-186, 369-376, 389-407), and it is unnecessary to repeat them. Suffice to say, a vein or lode is a fissure, crevice or opening in the country rock or general mass of the mountain, filled with material of different character, and perceptibly mineralized. It usually has width, strike and dip, but there is no uniformity either in width, dip, strike, continuity or mineralization. Some continue in the same direction, and some change course, strike or dip. Some are uniform in width for a given length or depth, and then change, and widen or pinch out. Few have continuous, uniform mineralization throughout, but are richer and pockety at points, and at other points in the vein entirely barren, and may

contain large inclusions of the barren country rock itself in its unaltered state. A vein or lode is whatever a miner can follow reasonably expecting to find ore. The essential ingredients are the mineral-bearing rock and the boundaries, and with either of these established, very slight evidence of the other will suffice. Often as in case of contact veins, the boundaries of enrichment are not perceptible to the eye at all, and can only be determined by repeated, persistent and tedious assays, which finally admonish when barrenness is reached and determine the boundaries and course of enrichment. In other cases where the boundaries are clearly visible, very slight evidence of values within the walls at any point or points will suffice, for it is recognized that the values may be immense at almost any point in its course or strike. This is especially true of fissure veins or crevices filled by gases, vapors, hot waters, etc., which are the mineralizing agencies coming up from the deep. These propositions have all been repeatedly held and instructed upon by the courts.

SECTION 343. Seeing then that there is no uniformity, the emphatic question is here, whether there are the walls, or boundaries of enrichment, and with enclosed material of different character, and possessing at some points mineral values in excess of the country rock on each side. If so, there is a vein. This does not preclude the possibility of barren samples being taken at one or a few points within the vein, or within an open cut in which the walls appear, but is entirely consistent therewith. The question is whether there is such a formation having walls, strike and dip, that a miner might

follow expecting to find values, and within which some values have been proven to exist. If so, there is such a lode or vein as might have afforded a mineral discovery by the locators over 16 years ago, and which the law presumes to have been made (Secs. 180a, 195-199). And if so, then the failure of Plaintiffs' witnesses to find mineral values recently, or their opinion based upon different exposures and evidences of mineralized matter within the walls, than those the locators observed, is nothing by which to determine the degree of prudence exercised by the locators in locating 16 years ago. They may have gotten much better samples of the vein material.

SECTION 344. Manifestly, what Van Orman, Healey, Ray, et al, saw or observed on this ground in the fall of 1913 could not have influenced the judgment or measured the prudence of the locator J. H. Clive in deciding to locate the ground as the Salt Lake No. 3 in February, 1897, unless it could be shown to be the very same as the locator saw, which was not attempted. These parties in the testimony we are considering, did not attempt to describe the physical conditions on the ground at any particular point or points, as to walls, included material, strike, dip, etc., which are the very first essentials of the inquiry, so that the jury might decide and the court instruct them, whether such conditions would amount to a lode or vein within the legal definitions. To the extent they did elsewhere or later speak of such physical conditions they sustained our own contentions in this respect. We speak of those admissions later. But much less did they undertake to identify any of the

conditions they saw with those which the locator saw and on which he undertook to make the Salt Lake No. 3 location.

SECTION 345. On the contrary, they spoke usually of "going over the ground" generally, to see if there were lodes or veins,—as if one might infer they expected to find them lying around loose on the ground like drift-wood, which anyone might see and know at a glance, in merely walking over the ground. Or as though the entire slopes had been cleaned with soap and water to promote their observation, rather than the shallow veneer of dirt and eroded material which covers nearly every mountain slope, and makes pick and shovel the emblem of the miner and prospector.

SECTION 346. And in the shafts and open cuts (with the exceptions mentioned where they substantiate our side as to fissures, veins and crevices by using "slips, breaks, fractures," etc., which have width, strike and dip, and usually included material of different character (Secs. 408, 436, 494-501), they do not state what the physical conditions were, as to walls, strike, etc., or a lead which a miner might follow expecting to find ore,—a cleavage line, a fracture, crevice, seam, or like occurrence in the country rock formation. They spoke of some of these workings on the ground having the appearance of being quite old, and partly filled with material from the surface of the ground, or the sides of the opening, and which were therefore indicative of possible excavations or workings at the time these lode locations were made, but they did not dig these out to see if they were in mineral at the bottom or not. (Record pp. 303, 347, etc.)

They were ready with "No sir" to confirm every question of their counsel implying that nothing they saw in either of the places amounted to a lode or vein within their understanding or definition of the term, as miners. But we insist that they could not legally substitute themselves (plus counsel) as triers of the fact, nor authorize the jury to take their conclusions or verdict upon what they saw. Without a definite and precise description of the physical conditions themselves, there is nothing to authorize a finding upon this phase of their testimony, regardless of its want of proved connection with the points or physical conditions on the ground, where the original discoveries and locations were made.

SECTION 347. And as to their allusions to finding no lodes on the general surface of the ground, these are insufficient to base a verdict, for much the same reasons. For as will be seen later when we reach the evidence on this subject, the lodes and veins in this ground appear to be at or very near the surface of the ground, with only a shallow covering of soil, gravel and slide from the elevations above, which are so common in every mining locality. (Secs. 455-476, 427-430 post.) An opening sufficient to expose any of these veins or lodes at nearly any point, only need be very shallow. But there is constant accretion of the loose surface soil or material from drainage, rains, storms and melting snows, sufficient to fill up surface openings, unless there is diligence to keep them open. The law provides for discovery work and exposure of mineral in place, but does not require that such opening be kept open. It likewise provides for stakes, monuments and markings, but not

for the maintenance of them thereafter. And subsequent obliteration does not impair or destroy the validity of the location.

Upton vs. Min. Co., 89 Pac. 275;
Walsh vs. Erwin, 115 Fed. 531-7;
Smith vs. Dowell, 86 Fed. 56.

Not that this proposition is fundamental in this case, but we are speaking now of the insufficiency of their testimony that they did not see lodes generally when going or walking over the ground. The emphasis of mining operations may have been elsewhere on this group of claims, and so long as the annual labor was kept up on these claims, as was admittedly the case, they can not complain if we or our grantors did not keep the openings up for their benefit.

SECTION 348. As we have said, the testimony set out later herein, shows there are lodes and veins at and near the surface in each of these lode locations, which could have been and doubtless were seen and observed by the original locators. Also by their own witnesses, if we may judge from their testimony considered in our next division hereof, devoted to their admissions. These will show that they were mentally applying a test which the law does not authorize, but forbids, when returning their answers to counsel that in their opinions as miners what they saw did not amount to a lode or vein. This emphasizes the impropriety of admitting their opinions without the physical facts and conditions themselves. These we objected to, and the court finally told us it was understood our objections

went to all the opinions. (Record page 283.) But without the lights thrown on this subject by their admissions, this branch of their testimony—the most favorable for them, is intrinsically insufficient to sustain a verdict.

For citation of ~~pages~~ cases showing the incompetency of such evidence in general as here considered, see Sections 486-491, 389-407, and 366a to 366c.

(D) BURDEN OF THE ISSUE AND PROOF ON PLAINTIFFS BELOW AS JUNIOR LOCATORS.

Before going further let us examine the burden of proof resting upon them if they would invalidate a prior location.

SECTION 349. As we have already shown (Secs. 180a, 193-197, 200), a prima facie mining location is presumptively valid and imports that there has been due legal compliance in making it, and that there has been a valid discovery of mineral to sustain it, of which fact the location certificate reciting discovery and exposure of a vein or lode is sufficient evidence. And possession under claim and color of title, is sufficient prima facie evidence of title, which includes all the facts requisite to constitute title of the particular property possessed and claimed. To overcome all of this, *strict proof* as well as *allegation* of the invalidating fact, is required. The junior locator or claimant has the burden of the issue, and holds the laboring ore all through.

SECTION 350. *Burden of Proof by Junior.* As the junior locator is claiming that which prima facie belongs to another, he is hampered by all the legal presumptions which sustain the title and claim of the senior locator, and he is required to make *strict proof* of each and every invalidating fact alleged.

> "In determining what constitutes such a discovery as will form the basis of a valid mining location, the tendency of the courts is toward *marked liberality of construction*, where the question arises between two miners who have *located claims* upon the same lode, or *within the same surface boundaries*, and toward *strict rules* of interpretation when the miner asserts rights in *property* which either *prima facie belongs to someone else*, or is claimed under laws other than those which provide for the disposition of mineral lands, in which latter case the relative value of the tract is a matter directly in issue.
>
> "The reason for this is obvious. In the case where two miners assert rights based upon separate alleged discoveries upon the same vein, neither is hampered by *presumptions arising from a prior grant* of the tract, to *overcome which*, strict proof is required."
>
> *Golden vs. Murphy*, 103 Pac. 406, Col. 1-2, citing:
>
> 1 Lindley on Mines (2d Ed.) Sec. 336, note 13;

Steele vs. Tanana Mines Co., 148 Fed. 678;

Lange vs. Robinson, 148 Fed. 799-803;

Mammoth Min. Co. vs. Grand C. Min. Co., 83 Pac. 648-677.

SECTION 351. These citations may be multiplied, but the above will suffice, since opposing counsel in answer to a question of the court on our last argument below, admitted that the burden of the issue and proof of invalidity was upon them as junior claimants. But as they have not always been entirely consistent in this respect, but have at times contended for a rule by which we as lode claimants would have to make a very strong showing as to mineral values (instead of none at all in limine), and also point out and show the court where the discovery originally occurred on the lode claims, we will say at this point that the only cases where a lode claimant has been held to any strictness of showing, were cases in which he was junior locator seeking to take away from a prior railroad, townsite or placer entryman (sometimes from patented ground), certain "known lodes" or veins claimed to have been known to exist prior to the time the previous entryman's rights went into effect. Under the statute in such cases, veins and lodes are excepted from the grant, but the courts hold nevertheless that, in order to warrant such exception the veins must have been known to exist, and also known to be valuable, as a commercial proposition, so as to justify extraction and marketing, and that the relative value for lodes and for townsite or agricultural purposes becomes material and that the junior or lode claimant must make all of this proof if appear by affirmative

he would succeed. The following cases illustrate this phase of the law.

Deffeback vs. Hawke, 115 U. S. 392-404; 24 L. Ed. 243;
Davis vs. Weibold, 139 U. S. 507-525; 35 L. Ed. 238 (reviewing decisions);
Dower vs. Richards, 151 U. S., 658-663; 38 L. Ed. 305;
Shreve vs. Min. Co., 28 Pac. 315-320;
Cowell vs. Lammers, 21 Fed. 200;
U. S. vs. Mining Co., 128 U. S. 673-83; 32 L. Ed. 571;
Bonner vs. Meikel, 82 Fed. 697;
Lindley on Mines, Sec. 336 n.15 and 28.

SECTION 352. But a senior lode claimant, unaffected and unhampered by rights flowing from prior grant of a tract, has never been held to that strictness, in order to make a first hand location on the public domain, nor yet has he ever had the burden of the issue thrust upon him where he stands on defensive against a junior claimant seeking to jump his property, and take possession of his ground.

SECTION 353. And as the lode locations carry title to the placer deposits and all substances within their side lines projected downward, title to the placers deposits rests upon the same facts which give title and possession of the ground as lode claims. It is one estate, not two. (Sec. 218 hereof). If the ground contains placer, the owner is that much better off, but the title is still protected by all the presumptions of legality and

regularity which go with the title to other classes of property, and which sustain a possessor's right to life, liberty and property of every kind.

SECTION 354. If Defendants in error had been prior locators and patentees of this ground under placer locations, and we should seek to locate and claim lodes and veins therein as "known veins" within the reservation of the statute (U. S. Rev. Stat. Sec. 2333), a situation would arise calling for strict proof against us as junior lode locators, not only as to existence and prior knowledge of the lode or vein, but as to their preponderating values. But that is not the situation. Our locations were first, and have been kept alive many years. It is they who seek to dispossess and oust a prior locator. They wish to prove not "known veins or lodes," but the contrary thereof, in order to establish their junior locations. They are barred by Sec. 2332 U. S. Rev. St. (Chapter 3), but anyway they have the burden of the issue, and of proof. For illustrations of the law as applied to junior placer claimants against senior lode claimants, see:

Bevis vs. Markland, 130 Fed. 226;
Cheeseman vs. Hart, 42 Fed. 102;
Muldrick vs. Brown, 61 Pac. 428.

SECTION 355.

"Slight evidence of the existence of a lode might satisfy the demands of the law upon the question of discovery as the basis of a location, when clear and convincing proof would be required to establish the existence of a "known vein" within a prior townsite or placer patent."

Lindley on Mines (3d Ed.) Sec. 336, p. 767.

"The Supreme Court of the United States clearly recognized this distinction between the two classes of cases, by intimating that the land officers might, on a prima facie case, decide the right of an applicant for a vein or lode and issue a patent therefor, upon proof less conclusive than would be required where a conflict arises between a *prior placer* and a subsequent lode patent."

Lindley on Mines, Sec. 336 p. 747, citing:

Iron S. Min. Co. vs. Campbell, 136 U. S. 286-93; 34 L. Ed. 155.

"It is the object and policy of the law to encourage the prospector and miner in their efforts to discover the hidden treasures of the mountains, and therefore as between conflicting lode claimants the *law* is *liberally construed* in favor of the *senior location.* But where one claims what prima facie belongs to his neighbor, because of an apex in the claimant's location, a more rigid rule of construction prevails against the claimant. And he has the burden to *show* not merely that the vein on its dip may include the ore bodies in the adjoining ground, but that in fact it does so include them. Until he has established that fact beyond reasonable controversy, he has no rights outside his side lines in another's ground."

Id., 83 Pac. 648-677.

SECTION 356.

"The particular character of each case must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in another. * * * The object of such law section, and the whole policy of the entire law must not be overlooked."

Mining Co. vs. Day, 85 Pac. 109-112.
See Book vs. Justice Mining Co., 58 Fed. 107, 121.

"It may be seriously questioned whether a discovery sufficient to support a valid mining location, so as to except it from the provisions of a townsite patent, should be held to the same degree of strictness, as would be required in the case of a mine known, or claimed to be known, to exist at the time of the issuance of the townsite patent, but which had not been previously located."

Golden vs. Murphy (Nev.) 103 Pac. 402, Col. 2.

SECTION 357.

"The requirements as to a "known" vein under U. S. Rev. Stat. Sec. 2333 (the placer statute) are different from those of the vein or lode which will justify a location under U. S. Rev. Sec. 2320 (lodes).

"Under the former the ledge must be known to be so valuable for its minerals as to justify expenditures for their extraction. Under the latter,

comparatively slight indications of a definite mineral bearing ledge have been held sufficient."

Railway Co. vs. Migeon, 68 Fed. 811.

SECTION 358.

"By bringing this action to acquire legal and actual possession of the whole of the Pioneer claim, the plaintiff has assumed the burden of establishing a *right of possession superior to the right of the defendant evidenced by* their *prior actual possession.*" 130 Fed. 227

"He must prove affirmatively that his grantor complied technically with all the requirements of the law in locating a placer claim, and *also that the land embraced in the claim was in fact public land of the United States,* which the law authorized him to locate and take into his exclusive possession as a placer claim." 130 Fed. 227

SECTION 359.

"He acquired no right under the placer mining laws to claim or hold a vein of metallic ore; nor to locate ground which under a prior location of a mining claim, not abandoned, relinquished or forfeited, the defendants were holding and claiming bona fide or peaceably."

Bevis vs. Markland, 130 Fed. 227.

"The burden of the issue, in a contest between the junior and senior locator of a mining claim, rests, and heavily, on the junior. He holds the laboring oar throughout, on all the vital issues and

questions. From him, the burden of the real issue never shifts."

Cheeseman vs. Hart 42, Fed. 105.

SECTION 360.

"One seeking to establish rights to mineral deposits in another's ground, is met at the threshold with the presumption that they belong to the owner of claims in which such deposits are found."

G. C. Min. Co. vs. Mammoth Min. Co., 83 Pac. 648-667-8.

"He, (the owner) is presumed to own all the ore deposits within planes drawn vertically downward to the deep, through the boundary lines of such claim, as well as *the surface*, and *everything eles appurtenant to the claim*. And such presumption continues until some other locator or owner establishes the fact that he is entitled to exercise the reserved rights by virtue of the statute.

To state the proposition in other words, there is a presumption of ownership in every locator, as to the territory covered by his location, and within his own lines he shall be regarded as the *owner* of *all valuable deposits*, until someone else shows by preponderance of the testimony, that such deposits belong to another lode having its top and apex elsewhere.

G. C. Min. Co. vs. Mammoth Min. Co., 85 Pac. 648-667-8, citing:

Min. Co. vs. Fitzgerald, 4 Morr. Min. Rep. 380;

Con. Wyo. Min. Co. vs. Champion Min. Co., 63 Fed. 540;
Doe vs. Waterloo Min. Co., 54 Fed. 935;
1 Snyder on Mines, Secs. 766, 783, 789.

(NOTE: While this was an apex question, the language is equally applicable to the case of a contesting placer claim.)

SECTION 361. *Effect of Evidence of Vein or Lode at Surface, on Right of Possession of Ralph.*

"Where, prior to the time Plaintiffs' grantor staked out a placer claim on public land, Defendants had taken steps to appropriate the same as a lode claim, and there was some evidence of mineral bearing rock on the surface, but an *entire absence of proof that there was not a vein of metallic ore,* such as might be located on as a vein or lode claim, Defendant's right to possession was superior to that acquired by Plaintiff."

Bevis vs. Markland, 130 Fed. 226.

SECTION 362.

"I concede that it may be impossible to prove, to a certainty that any twenty-acre tract of ground does not contain in its depths a vein of metallic ore, and that it would be unreasonable to deny the right to locate a placer claim for lack of such proof, where no prior claim conflicts. On the other hand it would be equally unreasonable to deny the validity of vein or lode claim located in good faith and based upon a discovery of indications sufficient to justify the

expenditure of labor and money in an effort to uncover a valuable mine, or before development work has progressed sufficiently to disprove the surface indications."

Bevis vs. Markland, 130 Fed. 228.

"If lack of evidence to prove the existence of a vein of metallic ore of sufficient value to pay for extracting the metal were sufficient to entitle the locator, of a placer claim, to recover possession from a prior locator, then a subsequent discovery of a vein apparently valuable would entitle a second locator of a vein or lode claim to recover possession from the owner of a placer claim, without waiting to demonstrate that such vein is in fact valuable, but my attention has not been directed to any precedent or statute or sound reason for permitting a claim-jumper to occupy the attention of the courts in litigation of actions to recover possession from the prior locator when there is not sufficient evidence to create a positive belief with respect to the facts essential to the validity of the prior location."

Id. 228.

See also Bell vs. Skellicorn, 28 Pac. 768-770.

Secs. 191-199, 350 ante.

(E) OPINIONS WITHOUT THE PHYSICAL CONDITIONS OR FACTORS IN LODES AND VEINS.

SECTION 363. Having now a clear understanding of the burden of proof, we will go back and apply it to the testimony of the Plaintiffs' witnesses, in Sections 327-330 ante, and also to that in Sections 493-501 post. In Secs. 327-330 there is no reference to any locality on the ground, except generally to cuts and openings. In Secs. 493-501 post there is reference to certain cuts or shafts in 2 or 3 instances only (Secs. 498-500). None of these shafts or openings are testified to be the same as any in which the locator Clive, or his employees the Jory's, saw or assumed to see a lode or vein in February, 1897—or the same as any physical indicacia in way of walls, strike, dip, gangue matter, etc., on which rests their degree of prudence in locating. And in none of them do they speak of whether or not there were walls, strike dip, gangue matter, etc., or a lead which a miner might follow expecting to find ore valuable enough to work (excepting always those confirmatory statements which we later quote in Secs. 367-368, 381, 388, substantiating Defendant's evidence as to the veins).

SECTION 364. To the extent they are silent, when it is their duty and burden to speak if they would prove or disprove anything against the Salt Lake No. 3, they fail to make out a case, and fail to disprove the original mineral discovery which arises upon our recorded location papers and testimony of the Jory's who did the work.

SECTION 365. Healey says that with his pan he obtained no color or values, but values at one point are not controlling or [redacted] necessary to the existence of a

vein. If the walls are there, the values may be found a little further on, or back, or up or down, from that point, as our decisions say. And his pan is not a self-proving test or prima facie test of values, even at the point he chose to take his sample from.

But as he or Phillips et al do not admit that he saw a vein, *eo nomine,* we have no assurance that they took their sample even from between the walls, and they may have selected a piece of country rock instead, they can hardly expect us to assume that they took it from the vein filling unless they will confess to us that they saw that filling, and the walls which constitute its boundaries. They do not tell us whether they did or did not see these elements of a vein. Why they took a sample at all is not very plain if they had no reason from the conditions there to suspect the presence of a vein.

Their counsel would then put such questions as this:

> "Based on your experience as a miner was there anything in that cut to indicate or show a vein or lode of any kind? A. No, sir."

But an opinion of a witness without the physical facts, have no value as evidence. As we said, they cannot substitute themselves in place of the jury as triers of the facts, and deliver their verdict, and authorize its acceptance by the jury under guise of such questions. We objected to these opinions without the facts right along, until we were told by the court it would go to every opinion they gave. (Record p. 283.)

SECTION 366a. In no case that we have been able to find have the courts allowed as evidence the mere state-

ment of opinion of a witness as to the existence of a vein or a lode, without an accurate and detailed statement of the *physical conditions* themselves which are relied upon as constituting such vein or lode, or absence thereof. In *Harrington vs. Chambers*, 1 Pac. 372-4 the opinions were held admissible after the witnesses:

> " * * * had given a detailed statement or description of the indications in question."

and

> " * * * after the facts as they existed had all been described,"

that is to say, they had testified to the existence of the walls, the width, strike, dip and included gangue or vein matter, for it is these which go to constitute a vein or lode, almost exclusively as we have shown in citations elsewhere (Secs. 389-406 hereof) while the question of values is a very minor inquiry, once the walls are proven, as we show by citation. Values are so unevenly distributed that a locator does not even have to find any values, but only the lode or "lead" which he can follow, and within which he may expect to find the ore he seeks. (Secs. 390-393, 406.) But values is all their witnesses ever spoke of among the physical ingredients of a vein, and sometimes they would actually find values, and sometimes not.

On the other hand, in Grand Cent. Min. Co. vs. Mammoth Min. Co., 83 Pac. 679, where the witnesses with one exception (that of Mr. Akers) did not attempt to locate the foot wall of the vein, and he did so only at one designated point, and that in judgment only, the

court held the opinions to be incompetent, and observed that *"it seems to exist in opinion only."*

SECTION 366b. In this case at bar, the Plaintiffs burden and effort in proof was to prove, not the existence of a vein or lode, but to prove the contrary, viz.: that no vein or lode existed in the ground at the surface points where they visted. But the same rule and test of the validity and sufficiency of their *opinions* as evidence, would apply, as if they were engaged in trying to prove that the veins do exist, viz.: they should offer to prove first that there were *not* any *walls* of the *fissures* having *width* of inclosed *gangue matter or material* which a miner might follow in its *strike* or *dip* and *expect* to find *ore valuable enough to work*—before attempting to offer their opinions whether what they saw amounted to a vein or lode or not.

SECTION 366c. They should also go further and show, or offer evidence *tending to prove* that the physical conditions, whatever they were, upon which they offer to give opinions, were the same as those at the time and place upon the ground which the locators saw and observed, and which induced them to make the location, as *in Ferris vs. McNally,* 121 Pac. 889-896. For if the conditions at the two times, years apart, are different, there is no predicate of facts upon which to base an opinion. (See Sec. 333.)

SECTION 366d. We will say just here, that where immaterial and insufficient testimony is let in, it does not increase, strengthen or modify its legal effect, nor create legal effect for it, nor authorize a verdict. On

the contrary, it is insufficient whether it is in or out. And if let in, while it is error to admit it, it is also error to base a verdict or judgment upon such insufficient testimony. And when we say "insufficient" we mean testimony having the legal quality of evidence to prove a thing.

SECTION 367. Going now to Sections 493-501 post, referring to certain specific openings on the Salt Lake No. 3, although Moran said and their map Exhibit A shows there are quite a number, they only attempt to speak of physical conditions as to walls, strike, dip or any similar occurrence in the rock formation, at some two or three points on the claim. We refer to these by the map in Sec. 8 ante which gives Plaintiffs' numbering on face of map, and Defendant's parallel numbering in a table on the margin opposite Plaintiffs' numbers or designation. These specific openings are shown as the "Mill Cut," and open cuts Nos. 1, 2 and 3 on their map, and at or about these points they used expressions which very well coincide with the existence of walls, strike, dip, gangue matter, etc., which are the legal and physical indicia of lodes or veins.

MILL CUT (Sec. 500 post.)

Phillips and Moran silent as to walls, strike, dip, etc., but Phillips got a perceptible assay of 63 cents.

Boyle saw a "fault" in the lower bench of the mill excavation which was a crushed, kaolinized fracture zone of material. Took a sample which assayed trace.

(See photograph of the 4-foot vein at this point Sec. 429 post.)

OPEN CUT NO. 1, (Sec. 498 post).

Moran says there is a slip or fracture in this open cut—a break in the country rock—a fracture. Ore might be deposited in such a "break" in the formation as that yes. There is what I would call a fracture at improvement No. 1 on the shaft right next to the road. It may be termed a vein. I usually refer to it as a *"fracture."*

Until I make assays of these slips, breaks and fractures I am not prepared to say there are no veins or lodes that might develop into pay ore, no; if I got a reasonably good assay for instance in Shaft No. 1, I would call that a lodè or ledge.

Phillips is silent about walls, strike, dip, etc., but managed to take two samples from this shaft, one of which assayed trace, and the other $1.34.

(For Defendant's testimony on this cut see Sec. 506 post.)

OPEN CUT NO. 2(Secs. 498 and 428 post).

Moran says there is a break in the formation at this point, but he would not call it a ledge. * * * It is a kind of hard to designate it as a lode it is practically on the surface; yes the total cut is 6 or 7 feet deep there; the break is in the solid formation there, yes.

Ore might be deposited in what I termed a *break* in the formation, yes. (Record p. 142.)

If it should develop that this break in the solid formation carries values of $5.80, $9.60 and $11.30 per ton—if I got assays of that value, I would develop the ground, and determine the extent of that ore. I took no samples or assays at that point, and could not pass an opinion on that.

If I got assays of that value, I would say it might be worth while to develop it as a mine, yes. I would say it could be located as a mining claim, yes.

(For Defendant's testimony on this opening see Sec. 506 post.)

(See photograph of the vein at this point at Sec. 428 post.)

OPEN CUT NO. 3 (Sec. 499 post).

Healey is silent as to walls, strike, etc., except he says this shaft was done in the *wash*. Probably mistaken, for,

Phillips says he took a sample from this point. He would hardly have taken a sample piece of dirt for assay. But the assay value is not reported.

(For Defendant's testimony see Sec. 507 post.)

SECTION 368. The court will see that all this is for the most part silent on the essential facts as to walls of country rock, the width, strike, dip, etc., and rests chiefly on opinion as to barrenness derived from observation, panning, and a assay of a sample or two at certain points part of which yielded values in gold, silver and copper. Granting that they also succeeded

in taking a barren sample, or on assaying a trace, this is no more than happens in every vein, even those yielding large values and profitable shipments. Even the inclusion of country rock here and there within the vein is very common. These points are illustrated in the following cited cases, and there are many dozens of cases throwing light on the subject in later sections.

SECTION 369. *Book vs. Justice Min. Co.*, 58 Fed. 107-121.

> "In some mining districts the country rock is found in broken blocks scattered throughout the vein or mineralized rock constituting what is known or called the lode. Where the lode or vein is wide, the country rock is occasionally found in large solid bodies extending for hundreds of feet in length and several feet in width, forming what is technically known as a horse.
>
> "And in other portions of the lode, loose rock will be found commingled, more or less, with the ore bodies of the vein or lode."
>
> *"Even in narrow veins there is liable to be an intrusion of the country rock into the vein, occupying almost its entire width, and sometimes leaving nothing but a narrow seam of clay leading the way for the miner to follow his vein until the country rock disappears, and the ore bodies are found continuing as before.*
>
> "Such conditions in the formation of the country rock, fissures and ore bodies are often deceptive and misleading. The owners of such veins or lodes

are often confronted with different theories, the truth or falsity of which can only be solved by expensive explorations."

"The same lodes, within short distances, often vary considerably in direction, width and dip, and they frequently split or divide into branches, both in length and depth."

SECTION 370. *Cons. Min. Co. vs. Champion Min. Co.*, 63 Fed. 540-544-5.

"True fissure veins and lodes often exist and are continuous without having any fissure filling of material in certain points or places, of mineral matter. A majority of such lodes have, in addition to the clean fissure filling of mineral, a considerable amount of decomposed wall rock, clay, etc.

"Between the walls will be found bodies of quartz, rich or poor, but there is also liable to be found in many places, short or long distances between the quartz bodies or pay chutes where no quartz will be found in the fissures between the walls. Yet the vein exists and is often as well defined as if the same was filled with quartz."

SECTION 371. *Golden vs. Murphy*, 103 Pac. 406.

"When the walls or boundaries are well defined, the vein differentiated from the surrounidng country, and the kind of material mentioned (broken, shattered rock, fissured and mixed with calcareous substances, conglomerate, etc.) constitutes the filling, evidence of slight value in mineral will, it seems, be sufficient to constitute a lode or vein."

SECTION 372. As far as that is concerned, the expectation which will justify a location of a mine, need not be confined to the finding of paying mineral in the particular seam upon which the discovery is made, but the locator may expect the "seam" to lead on toward a body of paying mineral within the ground located, and this "seam" with well defined walls will justify him in locating the claim.

McShane vs. Kenkle, 44 Pac. 979-982, col. 1.

SECTION 373. In Jones vs. Tunnel Co., 31 Pac. 642-5, col. 2, the physical structure of the ledge or thing located upon, as described in the opinion:

> "consisted of broken limestone, boulders, low grade ore, gravel, and sand, which appeared to have been subjected to the action of water. This was found at a depth of several hundred feet, and where there seems to have been no question that it was within the original and unbroken mass of the mountain."
>
> "HELD to be a vein or lode in the meaning of the law."

SECTION 374.

> "A lode within the meaning of the statute is whatever the miner can follow with the reasonable expectation of finding ore. Though he sees no ore, yet if he sees the gangue and vein matter, he discovers the lode, and is entitled to make a location."

G. C. Min. Co. vs. Mammoth Min. Co., 83 Pac. 648-677.

"The vein may be very thick or thin, in places, almost or quite pinched out, in miners' phrase; and in other places widening out into extensive ore bodies.

"So, also, in places, it may be quite or nearly barren, and at other places immensely rich.

"It may, and often does, require much time and labor and great expense to develop a vein or lode, after discovery and location, sufficiently to determine whether there is really a valuable mine or not; and a location would be necessary before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense, in case a rich mine should be developed."

Min. Co. vs. Min. Co., 11 Fed. 666-675;
Book vs. Justice Min. Co., 58 Fed. 107;
Shreve vs. Min. Co., 23 Pac. 315-320;
Lindley on Mines (3rd Ed.), Sec. 336, Note 29;
McShane vs. Kenkle, 44 Pac. 979-981.

SECTION 375.

"The elements of a vein are, the body of mineral or mineral-bearing rock, and the boundaries. With either of these things well established, very slight evidence may be accepted of the other.

"Such boundaries constitute a fissure, and if in such fissures ore is found, although at considerable intervals and in small quantities, it is called a lode or vein."

Min. Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712-4;

Iron S. M. Co. vs. M. & S. Co., 143 U. S. 404; 36 L. Ed. 204.

"a vein is by no means always a straight line, or of uniform depth, or thickness, or richness of mineral matter throughout its course. A cleft or fissure in which a vein is found, may be narrowed or widening in its course, and even closed a few feet, and then found further on. And the mineral deposit may be diminished or totally suspended for a short distance, but if found again in the same course, with the same mineral, within that distance, its identity may be presumed."

Mining Co. vs. Cheeseman, supra.

SECTION 376.

"A valid location of a mining claim may be made whenever a prospector has found such indications that he is willing to spend his time and money *in the expectation of finding ore.*"

Harrington vs. Chambers, 1 Pac. 362.

The same approved with this modification, viz.:

* * * "in expectation of finding ore sufficiently valuable to work." * * *

Shreve vs. Mining Co., 28 Pac. 315-320.

"It is enough if it is something ascertainable, something beyond a mere trace, which can be positively and certainly verified as existing in the ore."

Shreve vs. Mining Co., 28 Pac. 315-320.

"As defined by miners, the term 'lode' simply meant the formation by which the miner could be led and guided. It is an alteration of the verb 'lead.' Whatever the miner can follow expecting to find ore, was his lead."

Shreve vs. Mining Co., supra.

See also Secs. 181-186 ante and 389-407 post, for additional citations.

SECTION 377. In the midst of so much silence by their witnesses upon the most essential facts connected with their inquiry as to existence of lodes and veins, viz.: the walls, strike, dip, width, and included gangue matter, the following from Healey's testimony concerning the "streak" or "seam" in the Midas tunnel is very illuminating, as it shows their testimony is more significant for what they conceal or fail to speak about, than it is for what they disclose. In other words, to grant them the virtue of consistency, they applied the same system in regard to what they saw all over the three lode claims, and in all the cuts and openings, that they did in the Midas tunnel, and whenever they used such terms as "break," "seam," "fracture zone" or "streak," they had reference to a fissure vein of almost any width, having walls, strike, dip, and included vein matter.

SECTION 377. He said that in the Midas tunnel at point 22 on map (Sec. 8 ante), which was driven into the hard rock about 35 feet (elsewhere testified to being 75 feet in with cross-cuts), there was a *streak* 18 inches wide, containing crushed material or quartzite. Took a panning and got no results.

Now a streak has *length* if nothing else,—else it would be a mere dot and not a streak. And it has 18 inches of width. Here are two of the factors, the width and the strike. He could excuse himself perhaps from testifying that the streak had depth or *dip* on the ground his eyes could not penetrate the hard rock to see what was beyond the rock face exposed in the tunnel. But he does say the streak contained *"crushed material."* Now there could not be crushed material between the sides of the *streak* or vein without at least some depth, or dip, so as to get the body of the material that was *crushed.* And as the material was "crushed" within the streak and was not crushed outside the streak, the included material was different, and we just about have the three dimensions if not the "fourth dimension" of this *streak,* which shows it was a fissure vein. We saw the walls of this vein (Rec. p 302) But we are not yet ready to take up their admissions. Will do so later and show other testimony in harmony therewith. (Secs. 367-368, 381, 388 post.) We are now just showing what it is these witnesses mean when they refer to a streak, break, slip, seam, etc., and in the light of this understanding we may regard what has been testified as in Section 367 ante. The character of the "crushed material" within the "streak" may also be judged in the light of the decisions in Secs. 369-376 ante, and Secs. 389-407.

The other witnesses for the plaintiffs testified equally or more liberally than Healey, regarding this vein in the Midas tunnel, and the same deductions result as from Healey's testimony.

Moran speaks of the *two walls* of the vein in this

tunnel, and the material being ground up and different in appearance. By "ground up" we do not suppose he means there has been a stamp mill at work down in that vein, but that disintegration from the chemical and metallic elements of the vein not present in the adjoining country rock, has caused the *ground up* or disintegrated condition.

(F) PANNING, AS A PROCESS FOR FINDING VALUES IN ORE. UNCERTAINTY AND NON-UNIFORMITY OF MINERAL VALUES IN VEINS. DISAGREEMENT OF PROSPECTORS AND MINERS AS TO WHAT GROUND IT IS PRUDENT TO LOCATE.

SECTION 378. *Panning.* Just at this point, we may consider the panning process or operation, by which Healey and some of his friends assumed to determine the character or mineral value of whatever it was that they selected from this ground, and subjected to the panning. In the first place, we have no assurance that the rock or material they picked and worked on, was taken from a point which constituted a vein or lode or within the seam at all. They do not so inform us, but rather infer that they saw nothing that would be a vein. But if they did accidentally get in on one of the true veins, in the second place, they do not show that panning has any value as a test of lode mineral values. It is on them to show this if they would rely on panning to help vacate the lode claims. We may surmise that a piece of an

extremely free-milling class of ore, might be pounded up with a pestle, and panned and get some colors. It would depend on how abundant were the golden particles, if it were only a small piece of ore. While a more refractory specimen of rock would yield nothing in panning.

SECTION 379. But as shown on record, pp. 778-9, 784, panning is an entirely crude, inconclusive and insufficient method of determining lode values, so unreliable as to amount to nothing. Mr. Liddell, the mining engineer, said of it:

> "A. Panning at best is but a crude method of determining whether any material is actually valuable; it is a means that is largely used by the prospector, especially for determining gold, but the method is entirely inaccurate, and is not conclusive by any means; and only the approximate value can be determined; provided, however, that the utmost care is taken in the system followed; that is, you ought to take a certain weight of rock, you ought to crush it to a certain mesh, that is to a certain degree of fineness and you ought to use extreme care to see that none of the individual particles of gold, or the colors as they are called, wash over the edge of the pan; and, as quite often happens, the piece of rock will not pan when it will assay appreciably, and oftentimes assay to quite a large extent, but still does not show the gold in the pan. (Record p. 778-79.)

In other words, you cannot tell anything about it by panning. And if you could, they do not show they used sufficient care in pounding up fine, and manipulating the pan, as explained above.

Indeed Healey himself testified (Sec. 388 post) that he has seen rock that would assay $7 and $8 a ton, that would not yield anything at all in panning. And to bring it closer, this very witness testified elsewhere (Rec. pp. 54-60) that he obtained no colors or results by panning in these cuts on our ground, yet some of his samples or those of his witnesses when assayed produced values. (See Sec. 436 post) the g take from material that yielded nothing

SECTION 380. Furthermore, as explained in Book vs. Justice Mining Co., and other cases herein cited, the courts who try mining cases take judicial notice, that lodes and veins are not evenly mineralized throughout, and have no other uniformity, either in depth, width, strike, continuity, or other particulars. The witnesses might therefore get within the walls of a vein, fissure, crevice or seam, of which they spoke from time to time, in getting their samples for panning or assay, and get but a very poor sample, yet a few feet, inches, or yards further on, or back, or down, or obliquely from the point of the sample, there may be very rich values. Even if there are absolutely no values for a given space within the enclosing walls, this does not destroy the identity or characteristics of the vein. It may have better values elsewhere in that contact. And if it be only such a lead that a miner may follow in the *expectation of finding ore*, it is sufficient. And if the point where these witnesses saw it was poor or barren, yet the original locators may have seen it a little further on, or up or down, and gotten good samples. And it would still be a vein or lode that can be located upon.

SECTION 381. This insufficiency and uncertainty of their testimony is further emphasized by other state-

379

ments they made, showing there is no uniformity but constant differences of opinion among miners as to what mineral indications and appearances will justify miners in locating upon, not only as to probable values, but general outlook. One miner will look at and pass up what another will locate upon, and each miner does not always see what will attract the attention and favorable action of another. Their witnesses testify:

L. O. Ray.

Rec. Page

260 Yes, miners everywhere disagree as to what is worth locating and developing as a mine. One miner would come along and pass up certain ground that another man might locate. There is always a difference of opinion regarding mining ground, yes; even experts disagree regarding values, as well as ordinary miners.

R. L. Phillips.

347-8 Miners and mining men do disagree on everything, but less on locating than on developing; Prospectors and miners certainly disagree on what is worth while locating as a mining claim, yes.

Very often it happens that a number of prospectors pass over mining ground and do nothing about it, and another man comes along a year or a day later, and locates it, that is true; but the last fellow does not always see what the first fellow saw.

That is the history of all mining claims, certainly; one may see what the other man don't see.

And the two men may see the same thing and disagree as to its merits.

E. D. Boyle.

417 When two men examine properties at different times, they oftentimes get different results in their assay values, yes sir.

SECTION 382. In mining law, we do not need testimony to establish these principles by evidence, but it is well to notice their testimony, for they thereby subscribe to it. From the testimony it is evidently a question of judgment, like that exercised in buying a horse. It often takes a *horse man* to see and estimate the fine points or defects of a horse, and its possibilities. But even experts disagree, and some will overlook points that will influence the judgment of another with respect to buying. Yet a person with no skill or judgment whatever is entitled to buy a horse, although later he may either regret or rejoice in his bargain, and though some experts might disapprove.

The same holds true in law with regard to locating a mining claim (which is buying it), upon the public domain. It does not require the well-informed judgment of a mining expert to validate the location, for even experts disagree. On the contrary, any person of whatever occupation or profession in life, is entitled to locate a mining claim on the public domain, upon appearances which seem to him sufficient to justify the required expenditure.

McShane vs. Kenkle, 44 Pac. 979, 981.

SECTION 383. And such a locator is not obliged to obtain the judgment or approval of any experts, but his location is valid without. If he sees fit to consult an expert, he is privileged to do so, though he may either gain or lose thereby in a given case. The supposed expert may either have or lack the required skill either generally, or in the particular case. And it is said by the courts that the experts, to their credit, are constantly revising their opinions, with the developing light of science. Appearances are very deceptive as to mineral values, as these witnesses repeatedly testified. And none of them can look very far into the ground.

SECTION 384. As the service or favorable opinion of an expert mining man or prospector, genuine or otherwise, is not required to make a valid mining location, even by an inexperienced person, it follows that such valid location does not become invalid if such mining man or prospector should subsequently visit the property and give an unfavorable opinion upon its possibilities or values. If he had visited the ground and given such opinion before the location, it would not forever stamp the character of the ground as unavailable for location. If he does the same thing later, it cannot destroy the location. It is not so provided in the statutes or decisions. Add to this, that the mining experience and capabilities of Joseph Jory, who with his brother John Jory located the Salt Lake No. 3 in February, 1897, is shown by undisputed testimony (Record pp. 560, 600-3) to have been just as great, or greater and longer, than that of Van Orman, Ray, Phillips, et al, and we have this consequence, if our opponents' theories are to prevail,

viz.: A mining location made today upon and by the use of competent skill and experience, may be invalidated tomorrow upon other and like talent pronouncing against it. And if it may be done tomorrow, it may be done next year also, after immense expenditures by the locator or purchaser upon the faith of his title as purchased, and after competent opinion upon the abstract of title. If this is true, then not a mining title in the country is safe,—until all the "experts" are gagged and bound, or out on bonds.

(G) PAY ORE AND COMMERCIAL VALUES NOT A LEGAL TEST OF EXISTENCE OF VEIN OR LODE.

SECTION 385. *Illegal Tests Applied.* We suggested in Section 348 ante, that their witnesses in returning the desired negative answers to their counsel when asking whether anything they saw on the ground or in the open cuts, was a vein or lode within their definitions or experience as miners, were exercising certain mental reservations and qualifications concerning the degree of mineral values which the rock or material should contain, in order to entitle it to rank as vein or lode within their opinions and experience as miners,—which test the law does not recognize or permit in determining the existence of a vein or lode. And yet without the existence of such values, the witnesses for Plaintiffs below would not consent to call it a vein or lode at any point.

SECTION 386. They testified elsewhere (Secs. 367-

408, 493-501) to the existence of all the legal requirements of a vein or lode, and so did our witnesses (Secs. 427-430, 502-509) viz.: Fissures, seams, crevices, and the like, having walls and enclosed material of different character; with length, width and depth, hence the strike and dip; but they insist on the one factor which the law rejects, viz.: Values in a prescribed amount. And they further insist that such values must be so evenly distributed that they could ascertain the same by bare inspection, or by panning, at any one determinate point they might select, without following the vein, or further prospecting or expense.

SECTION 387. And even though it should be proved to them that such included material did carry assay values in suggested amounts more than the legal requirements, they still said they would not modify their opinions nor consent to call it a vein. In other words their opinions would prevail over assays in determining the extent of such values, and the extent of the values must exceed the law's requirements, in order to induce them to call it a vein. And yet their main witnesses admitted and testified that you cannot tell anything about values from the *appearance* of the rock or material. Of course, the witnesses had many an alias or synonim for lodes and veins, such as crevices, seams, shear zones, fracture zones, and dozens of others. Wherever possible, they shunned the words "veins and lodes," as words of hostile sound.

J. J. Healey.

SECTION 388.

Rec. Page

296 Q. Now what would you say if in sinking a shaft
297 to a depth of about 35 feet, there were no colors in the pan, but the assays showed values of from $7 to $10; would you say that hard rock might possibly be ledge matter?

A. Why if the ledge was there, yes. I have seen hard rock that would run $7 to $8 at 35 feet that would not pan.

Q. So if there should be any evidence adduced here showing that in any one of these workings there were assays of that value, you would change your opinion as to the lode values of the properties?

A. No, sir; I would not.

Q. You would not? A. No, sir.

W. J. Moran.

360 Q. Now you said that quartzite is the country rock on these three claims, did you not? A. Yes, sir:

Q. And you said the only evidence of lodes that you found are the fracture zones, or sheared zones as you called them in the quartzite, didn't you? A. Yes. * * *I can't say that I made any particular tests but from the character of the rock it is either quartzite or something very similar.

Rec. Page

Q. Now the mere fact that these sheared zones or fractures are in quartzite, is nothing detrimental to the property as a mining property, is it? A. Well it is possible to develop ore bodies in such formation, but such formations are not favorable to it. I think there have been mines developed in sedimentary rocks of that nature.

Q. Isn't it a fact that generally a careful mining man will not turn down properties simply because there are shear zones or fracture planes in quartzite?

A. Well, if he had high grade ore to start with, he would probably continue on it in a formation of that kind.

Q. Even if the shear zones are tight, the ore may be formed by replacement in the zones or fractures, isn't that a fact?

A. Yes, it may be.

363 Q. Well, if the fact is as I say with reference to the Bunker Hill Mine in the Coeur d'Alene District, would you be inclined to change your opinion as to the value of these claims as mining property having a potential value?

A. I would not consider them of any value unless there was high grade ore to start on in a formation of that kind.

Q. You would not consider them of any value?

Rec. Page

A. No, sir.

* * * *

Q. What reason then do you give for declaring these mining claims not valuable, if not that the formation is quartzite, and that the only indications of lodes or values are in the fractures or shear planes?

A. Well, as I said before, in such formations unless I had high grade ore to start on, I would not invest a cent trying to develop them.

364 Q. You say that the conditions here are not such as to warrant developing it as a mine, although in other quartzite formations, the conditions may be such as to warrant development; is that it? A. Yes, sir; they may.

Q. Why are the conditions here such as not to warrant the belief that claims may not develop into paying mines?

A. Well, I have never sampled or assayed any of the material, but from my observation it is what a miner would term pretty hungry looking material. If I had assayed it, and it was high grade ore in a formation of that kind, I would develop it, certainly. Q. Mr. Moran, you would not want this jury to understand that you could tell whether or not material in a fracture carries values simply by the appearance of it, would you?

A. Well, not altogether, no.

Q. No man, however much study he has put

Rec. Page

upon the subject can look at vein material, unless the mineral is of a certain character, and tell whether or not it carries values; is not that true?

A. I would not pass an absolute opinion upon it unless I did have it assayed; that is, if I discovered a deposit of ore, I would not turn it down until I determined the value of it.

Q. You would not pass an absolute opinion as to the values of these mining claims, because you haven't made assays?

A. Well I would state just simply from my observation.

Q. And the opinion you formed from your observation might be changed if it should develop that there are any values contained in any of these fractures?

365 A. No, I would not say any values; you can get values out of most any country rock. You can get them out of granite.

Q. How about a dollar, or two dollars?

A. I would not consider that worth developing at all.

Q. You don't know of very many mines that pay from the grass roots, do you? A. They have done it.

Q. Very frequently an assay at the surface of fifty cents, or a dollar or a dollar and a half, or there-

Rec. Page

abouts, will lead to big values underneath; isn't that true?

A. Well, of course, that might be the case in a new district that there has been no work done in; should think that would have a great deal to do with it.

Q. Well if in the district in which these claims are situated it should appear that many thousands, or hundreds of thousands of dollars worth of ore has been extracted, that might lead you to believe that these particular claims are of value, might it not?

A. I din't examine any further than these three claims; I don't know what ores have been extracted.

Q. Well if it should appear that on adjoining claims very much ore has been extracted; would you then change your opinion regarding the merits of these three claims?

367 A. No, I don't believe I would.***

Q. If it were a fact that in 1912 shipments of ore were made from claims adjoining the Evening Star and Salt Lake No. 3, would that change your opinion? A. No, sir; it would not.

Q. Mr. Moran, do you believe the size of the vein is the controlling factor in its value? A. No.

Q. You think if the fracture or seam or shear zone is very small, it might still be a likely mine, do you?

Rec. Page

A. If the ore was very valuable.****

369 The size of the fractures or shear zones is not important altogether, no; the value of the ore has a great deal to do with it.

The quartzite formation is unfavorable in my opinion, especially where you don't have rich ore on the surface to develop your mine from.

370 Q. Well it comes to this, Mr. Moran, that the controlling factor with you is whether there is rich ore on the surface, isn't it? A. That is one of the factors.

Q. That is one of the controlling factors with you? A. Yes.

Q. And you said a while ago if there were some values at the surface, it might pay to work as a mine, didn't you?

A. I didn't say some values.

Q. Is it a fact if there were some values at the surface, it might pay to work it as a mine?

A. I said there are some values in every mine; I would not say some values; if there was any high grade ore, or ore that was profitable, I would spend money to develop it.

Q. As you said a while ago, very many mines do not pay from the grass roots, as the miner says?

A. No, they don't extract commercial ore from the grass roots.

Rec. Page

R. L. Phillips.

347 Q. You would say in your opinion if a fracture contained mineral, that it would not be worth while to develop it as mining property? A. No.

Q. As a miner, that is the policy you would follow? A. Yes.

Q. Even if the mineral was in place within well defined walls?

A. Yes.****

349 Q. Suppose you had made an assay of the vein or fracture as you call it, in the Midas Tunnel, and found that it carried values, you would say then that that should be locatable as a lode claim, wouldn't you?

A. No, I would not.

350 Yes, I said that the filling in the fracture in the Midas tunnel was decomposed and altered. And it has a different appearance from the material on each side of the fracture wall. Yes, it is in place.

Q. You then give it as your opinion that possessing those qualities of being a fracture, and in place, and in addition carrying values, that it would not be locatable or workable as a mining claim? A. No, it would not.

351 Yes, veins that pay to work as mines do occur in sedimentary rocks; depends on the district where they are. The fact that the formation is sedimentary is not conclusive that there could not be veins, no.

Rec. Page

E. D. Boyle.

409 Q. Now going away from the geological definition, did you discover upon that ground what you as a mining engineer or mining man would consider a vein or lode?

A. I did not **as a commercial proposition** which I would locate with the expectation of ever having it return—or ever getting **commercial returns**; I saw nothing on the ground which I would consider a vein or lode.

428 I have said repeatedly I don't know what the formation is in that section, but I believe it is quartzite; but if it is quartzite I don't think that has anything to do with determining the value of the claims.

SECTION 389. The manifest implication from all the foregoing testimony is that in the understanding of the witnesses, no mineral substance or fissure filling is entitled to rank as a vein or lode although it may have width, strike and dip, and enclosing walls of country rock, without it also have values in some definite amount which shall exceed nominal, and must approximate a commercial vein, or one from which commercial returns may be expected.

This theory is wholly contrary to the decisions we cited in Secs. 181-186 ante, infra 389-407 and also to all those cited within Secs. 369-376 [illegible] but before setting out the latter, we wish first to make special comparison of the testimony of the witness W. J.

Moran, in the foregoing excerpt, with that of the made-up expert whose testimony the court was considering in the case of Book vs. Justice Mining Co., 58 Fed. 106. It will be seen how parallel is their testimony and reasoning as to the extent of mineral values required to constitute a lode or vein, within their respective conceptions. We will quote from the opinion in Book vs. Justice, not only the testimony there quoted, but the illuminating remarks of Judge Hawley in holding the same insufficient and incorrect. Beginning on page 122 of the opinion:

> "Great reliance is placed upon the testimony of this witness. His testimony is given from information obtained by reading elementary works on mineralogy and geology, and is to the effect that the yellow porphery is not a lode, and that all the land on Justice Hill, except that part embraced in the Peerless location, should be classed as agricultural, not mineral land.
>
> This witness testifies to theories. *The value of testimony of this character,* in controversies of this kind *depends* to a great extent *upon the strength or weakness of the reasons given in support of the conclusions reached.*

Just a few of the many questions and answers upon his cross-examination, as to what he considered was a lode or vein will be given:

> "Ques. Excluding all the excavations that you have testified about within the boundary lines of the West Justice, Blaine, and Peerless claims, which

are laid down upon the maps of the Plaintiffs and Defendant, what difference, if any, is there presented to the eye between any of the claims?"

"Ans. Over the surface of the West Justice and Blaine claims there is but little difference in the surface appearance, excluding the excavations. I think the surface of the hill is very much the same, outside of the croppings of the rocks."

"Ques. And you have included in that answer all the land embraced within the West Justice, James G. Blaine, and Peerless location, and including the Peerless location inside of the Blaine?"

"Ans. Yes, sir."

"Ques. If, as a matter of fact, you had, upon taking samples, and having assays made, and making them yourself—you had ascertained that that formation contained gold and silver would you say that that formation constituted a lode?"

"Ans. I would not, unless it contained gold and silver in sufficient quantities to make it valuable for mining purposes."

"Ques. In ascertaining that fact, would you deduct from the value the actual cost of mining, the actual cost of labor, the actual cost of milling, and the actual cost of all the material used in mining the ore up to the time that the result of the working of your ore had been obtained, leaving a profit for yourself?"

"Ans. I might. Probably, that would be the proper course to pursue."

"Ques. In your judgment, before you would call that country about which you have testified a lode, would it be necessary for you to find the precious metals of gold and silver in sufficient quantities to pay all the expenses incident to mining, hauling, reduction, etc., and leave a profit besides?"

"Ans. I would expect it to pay throughout the extent of the rock, over and above expenses."

"Ques. And, until that result was obtained, you would not call it a lode?"

"Ans. I would not say it was a lode unless I found the metals in it to pay the cost of mining. * * * I would not call it a lode unless it was sufficiently mineralized to make it pay to work, or else it would be subject to location as agricultural land * * *"

"Ques. Suppose you found a homogeneous formation between defined boundaries, and upon investigation you ascertained the precious metals did not exist in sufficient quantities to pay for mining. Would you say it was a lode?"

"Ans. I would reject it as a lode. The water of the ocean contains more gold and silver, in proportion, than the ore of that hill; and yet I don't claim that the ocean is a lode, simply for the reason that it contains more gold and silver

than that hill. But it is a fact that the water of the ocean contains more gold and silver, in proportion, than the rocks of the hill in question. * * *"

"Ques. Assuming as a fact that the cost of reduction is $5.00 or $6.00 a ton; and that the cost of labor is $4.00 a day, would you not say that the ground embraced in the locations named was not a lode unless gold and silver existed in sufficient quantities to cover at least those expenses?"

"Ans. I would not say it was a lode unless it produced it in much greater quantity than that. * * *"

"Ques. Is it your understanding that, before a man can locate and acquire title to mineral land, he must actually develop a property that will pay the expenses I have named?"

"Ans. Yes, sir, he has no right to make a location until he develops such a lode by means of a tunnel, shaft, or other workings."

"The answers of the witness to the questions asked constitute the keynote to the theory relied upon by complainants, to prove that no discovery of a vein or lode had been made within the limits of the West Justice and Blaine locations prior to the location of the Peerless lode. Other witnesses upon the part of the complainants defined what they understood to be a lode substantially to the same effect. If this theory were adopted by the courts, it would invalidate many mining locations."

"Logically carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place, bearing gold or silver, which he has discovered, would pay all the expense of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it is manifest that it would produce absurd, injurious, and unjust results, destructive of the rights of prospectors and miners, in their honest, patient, and industrious efforts to explore, discover, and develop the veins and lodes that exist in the public mineral lands of the United States."

"A vein or lode of quartz or other rock in place, bearing gold and silver, is found upon the side of a hill or mountain. It is within well-defined walls, and the rock assays from $1.00 to $15.00 per ton. The cost of extracting, removing, and milling the ore is $20.00 per ton."

"The miner making the discovery is aware of this fact, but he knows, or has good reason to believe from his own knowledge, gained by years of experience, that, within or along the veins or lodes of that particular district, places are liable to be found that may prove to be of much greater value, and that the ore is ~~liable~~ liable to be richer at a greater depth than it is upon the surface."

"Now in such a case, can it be reasonably claimed, under the provisions of the mining laws, that

the person making the discovery, a discovery which in good faith, induces him to locate the vein or lode, and to commence the running of a tunnel into the hill or mountain for the purpose of properly working and developing the ground, and complying with all of the provisions of the law, after he has expended thousands of dollars in labor and improvements upon the same—can be deprived of his location by the fact that other persons, subsequent to his discovery and to his location, went upon the hill 500 or 1000 feet distant from the place where he had found and prospected the lode, but within the limits of his location, and there, by sinking a deeper shaft upon the same lode, found ore which assayed over $40.00 per ton—enough to insure a profit to the owners—and thereupon located the ground?"

"This may be an extreme case, but it fairly illustrates the theory, for, according to the testimony of some of complainants' witnesses, the latter location would be valid, and the prior location invalid."

"The act of Congress is not susceptible of any such construction. *It does not impose any conditions as to the value or extent of the ore.* It simply provides that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

Judge Sawyer, in construing this provision of the statute, correctly instructed the jury in Jupiter Min. Co. vs. Bodie C. Min. Co., 11 Fed. Rep. 675, that:

"A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute."

It is not enough to discover detached pieces of quartz, or mere bunches of quartz in place."

"The vein, however, may be very thin, and it may be many feet thick, or thin in places—almost or quite "pinched out," in miners' phrase—and in other places widening out into extensive bodies of ore."

"So, also, in places, it may be quite or nearly barren, and at other places immensely rich."

"It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, * * * within the lines of the claim located, to make a valid location including the vein or lode."

"It may, and often does, require much time and labor, and great expense, to develop a vein or lode after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary, before incurring such expense in developing the vein, to secure to the miner the fruits of his labor and expense in case a rich mine should be developed."

In Eureka Consolidated Min. Co. vs. Richmond Min. Co.,—supra, Mr. Justice Field, in delivering the opinion

of the court, discussed this question as to what constituted a lode at great length, and came to the conclusion:

> "That the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock."
>
> "It includes * * * all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

This definition, where applicable to the facts, has been approved and followed, and is recognized and declared to be correct by the supreme court of the United States in Mining Co. vs. Cheeseman supra, where the court said:

> "A body of mineral or mineral-bearing rock, in the general mass of the mountain, so far as it may continue unbroken, and without interruption, may be regarded as a lode, whatever the boundaries may be. * * * With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode."

Hyman vs. Wheeler, supra, is to the same effect.

In Burke vs. McDonald, supra, the court held that:

> "A lode, within the meaning of the statute is whatever the miner could follow and find ore. Under the requirements of the law, a valid location

of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only."

Book vs. Justice Mining Co., 58 Fed. 107, 122-128.

SECTION 390.

"A lode within the meaning of the statute, is whatever the miner can follow with the *reasonable expectation of finding ore.* Though he sees no ore yet if he sees the gangue and vein matter he discovers the lode, and is entitled to make a location."

G. C. Min. Co. vs. Mammoth Min. Co., 83 Pac. 648-677.

"The gangue material is easily distinguished from the country rock."

Min. Co. vs. Min Co., 83 Pac. 648.

"It need only be a vein in place, as distinguished from float, the matrix of the ledge. This cannot always be described, but the experienced miner will have no difficulty in recognizing his lode when seen.

See authorities cited under Snyder on Mines, Sec. 348.

"Within well defined boundaries, very slight evidence of ore will prove the existence of a lode, and be sufficient to constitute a discovery, and justify location."

Snyder on Mines, Sec. 349, citing:

Iron Silver Min. Co. vs. Cheeseman, 116 U. S. 529, 29 L. Ed. 712, which latter case we have herein cited to "Discovery."

"As often occurs in veins of substitution, the presences of ore in rock in place, even though poor in value, will be recognized to the extreme point of its occurrence, and a discovery thereon made would be sufficient.

Snyder on Mines, Sec. 349, citing:
78 Fed. 787 and other cases.

SECTION 391. Governor Boyle testifies, at pages 432-4, that it is true that the application of the stringent rule he proposes for determining the validity of a lode location, will result in invalidating ninety-five per cent of the lode locations in the State of Nevada.

Such is not the policy of the law, nor would there ever be any prospecting done if such were the rule.

"It is the object and policy of the law to encourage the prospector and miner in their efforts to discover the hidden treasures of the mountains."

Golden vs. Murphy, 103 Pac. 402;
Mining Co. vs. Min. Co., 83 Pac. 648-677;
Book vs. Justice Min. Co., 58 Fed. 107.

SECTION 392. In Chrisman vs. Miller, 197 U. S. 313, 49 L. Ed. 770, the Supreme Court approved the ruling of the Land Department in Castle vs. Womble, 19 L. D. 455-457, as follows:

"Where minerals have been found and the evidence of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby all valuable deposits in lands belonging to the United States are declared to be free and open to exploration and purchase.

SECTION 393.

"No court has ever held that in order to entitle one to locate a mining claim, ore of commercial value in either quantity or quality must first be discovered. Such a theory would make most mining locations impossible."

Lindley on Mines, Sec. 336, N. 29, citing cases.

"Logically carried out, it would prohibit any miner from making any valid location until he had fully demonstrated that the vein or lode of quartz, or other rock in place, bearing gold or silver which he had discovered, would pay all the expenses of removing, extracting, crushing and reducing the ore, and leave a profit to the owner. If this view should

be sustained, it would lead to absurd, injurious and unjust results."

Lindley, Mines, Sec. 336, N. 30, citing:

Book vs. Justice Min. Co., 58 Fed. 107, 124;

Bonner vs. Meikle, 82 Fed. 697-703.

"To hold that in order to constitute a discovery as the basis of the location, it must be demonstrated that the discovered deposit will when worked, yield a profit, or that the lands containing it are in the condition in which they are discovered, more valuable for mining than for any other purpose, would be to defeat the object and policy of the law. It is enough if the vein has a present or prospective commercial value.

Lindley 336 n. 23; citing:

Madison vs. Oil Co. (Cal.), 99 Pac. 176-8;

SECTION 394. *Vein or Lode and Discovery. What constitutes.* The following definitions as to what constitutes a vein or lode of mineral in place within the statute, *U. S. Rev. Stat. Sec.* 2320, and a sufficient discovery to sustain a lode location, will assist the court in passing on the evidence in these cases.

"A vein or lode is a body of mineral bearing rock within defined boundaries, in the general mass of the mountain. In this definition, the elements are the *body of mineral* or mineral bearing rock, and the *boundaries*. With either of these things well established, *very slight evidence* may be accepted of the other."

Mining Co. vs. Cheeseman, 116 U. S., 529; 29 L. Ed. 712-4.

"A body of mineral, or mineral bearing rock, in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied.

Id.

"On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode."

Id.

"Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a lode or vein."

Id., and

Iron S. M. Co. vs. M. & S. Min. Co., 143 U. S. 393, 404, 430; 36 L. Ed. 204.

And cases reported in:

69 S. W. Rep., 572;

24 Pac. Rep., 200;

40 Fed., 787;

126 U. S., 673;

44 Pac., 979-982;

68 Fed., 812.

Min. Co. vs. Min. Co., 83 Pac. 648-676-7.

SECTION 395.

"Within well defined boundaries, very slight evidence of ore will prove the existence of a lode, and be sufficient to constitute a discovery, and justify a location."

Snyder on Mines, Sec. 349, citing:
Iron Silver M. Co., vs. Cheeseman, 116 U. S.,

SECTION 396. *Vein or Lode—Discovery. Definitions.*

"A lode within the meaning of the statute, is whatever the miner can follow with a reasonable expectation of finding ore."

"That though the miner *sees no ore*, yet if he sees gangue and vein matter, he discovers the lode."

And that the above conditions are sufficient to warrant a valid location thereon.

Golden vs. Murphy (Nevada), 103 Pac., 406;
Shreve vs. Min. Co., 28 Pac., 320, col. 1.

SECTION 397.

"A fissure in the earth's crust, an opening in its rock and strata made by some force of nature in which the mineral is deposited would seem to be essential to the definition of a lode, in the judgment of geologists."

But to the practical miner, the fissure and its walls are only important as indicating the bound-

aries within which he may look for and reasonably expect to find the ore he seeks."

"A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute a lode, in his eyes."

"We are of the opinion therefore, that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries, clearly separating it from the neighboring rocks."

The Eureka case, 4 Sawy., 302, 311;
Fed Case. No. 4, 548.

The Eureka case has been widely quoted and approved by the courts in mining cases on this subject.

"Interruptions in the mineral bearing rock are not sufficient to destroy the identity of the vein."

Min. Co. vs. Cheeseman, 116 U. S. 529, 534, 29 L. Ed. 712;

Buffalo Zinc Etc. Co. vs. Crump., 69 S. W. 572, 575;

Min. Co. vs. Min. Co., (Ida.) 83 Pac. 648, 676, Col. 2.

SECTION 398. The foregoing definitions of the rule as to a sufficient mineral discovery has been universally quoted and approved by the courts as the rule in Book vs. Justice, but did not originate with that case. It had previously been declared as the law in:

North Noonday Min. Co. vs. Orient Min. Co., 1 Fed. 530-1;
Jupiter Min. Co. vs. Bodie Cons. Min. Co., 11 Fed. 666-675-6;

and has been declared and approved again and again by the courts everywhere as the law governing a sufficient discovery, and ought to be considered measurably well settled at this time. See:

Golden Terra Min. Co. vs. Mahler, 4 Morr. Min. Rep. 390;
Duggan vs. Davey, 4 Dak., 110; 26 N. W. 887;
Upton vs. Larkin, 7 Mont., 449; 17 Pac. 728;
Wenner vs. McNulty (Mont.) 14 Pac. 643;
Overman S. M. Co. vs. Corcoran, 15 Nev. 147;
Snyder on Mines, Sec. 345;
Shoshone Min. Co. vs. Rutter, 87 Fed. 801-7;
Fox vs. Myers, 29 Nev. 169; 86 Pac. 793;
Lange vs. Robinson, 148 Fed. 801-2;
Ambergris Min. Co. vs. Day, 85 Pac. 109-113, citing:
McShane vs. Kenkle, 44 Pac. 979;
Muldrick vs. Brown, 61 Pac. 428;
Iron S. M. Co. vs. Cheeseman, 116 U. S. 529; 29 L. Ed. 712;
1 Snyder on Mines, Sec. 345;
Harrington vs. Chambers, 1 Pac. 375;
Ry. Co. vs. Migeon, 68 Fed. 811; 77 Fed. 255;
Min. Co. vs. Min. Co., 63 Fed. 540-544;
Bonner vs. Meikel, 82 Fed. 703;

Oil Co. vs. Oil Co., 98 Fed. 673;
28 Pac. 320;

Cascadin vs. Bartoles, 162 Fed. 271;

SECTION 399. The above list is not exhaustive, but only a few of the decisions which have followed the rule in *Book vs. Justice Mining Co.*, 58 Fed. 107.

"The question of what constitutes a lode or vein discovery under U. S. Rev. St. 2320, has been decided by many courts * * * The liberal rules thus established are substantially to the effect that:

"When the locator of a mining claim finds rock in place containing mineral in sufficient quantities to justify him in expending his time and money in developing the claim he has made a discovery within the meaning of the statute whether the rock or earth is rich or poor, whether it assays high or low."

Snyder on Mines, Sec. 348, quoting from:

Migeon vs. Ry. Co., 77 Fed., 249, 255;

Harrington vs. Chambers, 3 Utah, 94, 1 Pac. 362;

Hays vs. Lavagnino, 17 Utah, 185, 53 Pac. 1029.

SECTION 400. *Pay Ore Need not be Found.* As the Plaintiffs' criticism of Jory's and Jurey's testimony involves a denial of this principle, we cite a few cases in refutation.

Pay ore need not be found in order to constitute a valid discovery.

27 *CYC*, Page 556, note 47, citing:

Score vs. Griffin (Ariz.), 80 Pac., 331;
Min. Co. vs. Maier (Calif.), 66 Pac. 863;
Armstrong vs. Lower, 6 Colo., 393;
Min. Co. vs. Mahler, 4 Morrison Min. Rep., 390 (Dak.);
Burke vs. McDonald (Ida.), 29 Pac. 98;
McShane vs. Kenkle (Mont.), 44 Pac. 979; 33 L. R. A. 851; 56 Am. St. Rep., 579;
Walsh vs. Mueller, 40 Pac., 292;
Davidson vs. Bordeaux, 38 Pac., 1075;
Shreve vs. Min. Co., 28 Pac., 315;
Min. Co. vs. Corcoran, 15 Nev., 147;
Muldrick vs. Brown (Ore.), 61 Pac., 428;
Min. Co. vs. Rutter, 87 Fed., 801;
Bonner vs. Meikel, 82 Fed., 697;
Meydenbauer vs. Stevens, 78 Fed., 787;
Book vs. Min. Co., 58 Fed., 107;
Min. Co. vs. Min. Co., 11 Fed., 666;
34 Cent. Dig. "Mines and Minerals," Sec. 24;
Murray vs. White, 113 Pac., 754-6;
Mason vs. Min. Co., 214 Fed., 32;
Oil Co. vs. Oil Co., 98 Fed., 673-676.

SECTION 401. *Sufficiency of Discovery.* HELD: The finding of ore or metalliferous rock in place in a defined vein is sufficient to satisfy the statute (U. S. Sec. 2320), although it does not contain ore in paying quantities.

If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time

and money, it is sufficient as against a subsequent locator for mining purposes.

Muldrick vs. Brown, 61 Pac. 429, citing:
Barringer & A. on Mines Sec. 214;
Ry. Co. vs. Migeon, 68 Fed. 811;
Harrington vs. Chambers, 1 Pac. 362;
Burke vs. McDonald, 29 Pac. 98;

SECTION 402. The facts in Muldrick vs. Brown, supra, regarding discovery are about parallel with the facts in the cases at bar, as shown elsewhere in this brief, and they were held sufficient, viz.: Senior lode and junior placer locator, with allegation of non-discovery of mineral in senior lode location, by the placer locator.

SECTION 403. (*Pay Ore*) *In Lange vs. Robinson*, 148 Fed. 799-801.

After stating the facts, HELD:

"It will be noticed from the foregoing statement of facts that prior to making the locations under consideration, plaintiff did not actually discover gold in paying quantities upon the claim located, but he did find some small quantities of gold therein."

"Was this sufficient to give the plaintiff the right to locate as placer mining claim the lands upon which this gold was found?"

(The Court then proceeds to hold that the rule laid down as to the sufficinecy of a vein or lode discovery applies to the sufficiency of the precious metals required to sustain a placer location, and applies the rules an-

nounced in *Book vs. Justice Min. Co.*, 58 *Fed.* 106, quoting it.)

The Court further liberally quotes, to the same effect, from the decisions in:

Migenon vs. Montana Cent. Ry. Co., 77 Fed. 249;
Min. Co. vs. Rutter, 87 Fed. 807;
Oil Co. vs. Oil Co., 98 Fed. 673;
Chrisman vs. Miller, 197 U. S., 313; 49 L. Ed., 770;

and upholds the discovery as sufficient to sustain the location in question.

SECTION 404. *Pay Ore.* It is enough if the ore has a present or prospective value.

Ry. Co. vs. Migeon, 68 Fed. 811;
Madison vs. Oil Co., 99 Pac. 176-8.

It need only be such as a miner could follow expecting to find ore.

Shreve vs. Min. Co., 28 Pac. 315-320, Col 1 citing cases.

This last case of Sheve vs. Min. Co., reviews all the previous learning derivable from the U. S. Supreme Court decision, and the following extract is full of meaning, for these cases:

> "It is perfectly apparent from our examination of the decisions of the U. S. Supreme Court, that we may state one proposition positively; that is, that that Court has never yet held, as did the Court below,

that in order to entitle one to locate a mining claim, he must first disclose a vein or lode of mineral bearing rock of such richness as to justify work to extract them."

"And it is just this fact which has made and will ever make the mines; the ever present and alluring appearance of value, and the occasional reward of development. Without prospecting there will be no discovered mines. Without the privilege to locate and claim and hold a discovery, there will be no prospecting."

"If the locator must show a paying mine at location, the riches in these mountains are a locked treasury. The law does not contemplate this."

28 Pac. 315-323, col. 1.

The vein need not contain ore sufficient to pay a profit, to sustain discovery and location.

Cascaden vs. Bartolis, 146 Fed. 740;
Charleston vs. Kelly, 156 Fed. 436.

The citations to this point are innumerable, and we need not continue them.

SECTION 405. We even go further, and say that the locator does not have to *find any* values in the vein before he makes the location. He need only find the gangue or vein matter or material between walls in which the values may or are likely to be found and then he can validly locate.

SECTION 406. *In Shreve vs. Min. Co.*, 28 *Pac.*

315-320, *the Court,* first quoting from Harrington vs. Chambers, 1 Pac. 362-375, as follows:

"A valid location of a mining claim may be made whenever a prospector has discovered such indications of minerals that he is willing to spend his time and money in *expectation of finding ore.*"

said:

"This language I do not feel that I can fully adopt. It goes further than there is necessity for, or is required, to sustain the views I hold. If I were modified to say: 'In expectation of finding ore sufficiently valuable to work' the views of the learned Chief Justice would be nearer to the opinion I hold."

SECTION 407.

"But observe the words of Judge Hallett, cited above, where he says: 'Nor is it necessary that the ore shall be of economical value for treatment.' And the language of the context, *Stevens vs. Gill, supra.*

"It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery."

Shreve vs. Mining Co., 28 *Pac.* 315-320.

"No Court has ever held that in order to entitle one to make a mining claim, ore of commercial value, either in quantity or quality, must first be discovered. Such a theory would make most mining locations impossible."

Lindley on Mines, Sec. 336, note 29, and cases.

(H) OTHER EXPRESSSIONS BY THEIR WITNESSES EXPRESSIVE OF VEINS AND LODES. ERRONEOUS REQUIREMENT OF COMMERCIAL VALUES OR RETURNS.

SECTION 408. In addition to the expressions by Plaintiffs' witnesses in Secs. 367, 377a, 388, the following by their witnesses is expressive of lodes and veins in this ground, by characteristics, in connection with their testimony requiring excessive mineral values in order to induce them to call the lodes and veins by that name.

E. D. Boyle.

Rec. Page

407 Being asked whether in his examination of the ground he had come to any conclusion **whether any lode or vein was exposed** elsewhere on the ground than in the Midas tunnel, answered:

"Well the distinction between a fracture zone or fault and a vein, within the meaning of the statutes—(interruption). "I have been asked to testify whether I saw a vein or lode; now I was going to say that a vein is any sort of an opening in general country rock which is filled with a material that may differ from the material which surrounds it, and ac-

408 cording to the theory of geologists, filled by some one of the agencies which go to make up veins. But

Rec. Page

a mineral-bearing vein and an ordinary vein are two different things.

Q. You did then find what geologists might term a vein? A. Yes, there were deposits there which geologists might term a vein.

Q. What is the geological definition of a vein? A. Well there are many definitions, but perhaps the best is, "A vein is a deposit filling a fissure or an opening in the general country rock, supplied by either hydro-thermal or pneumalitic agencies, as distinguished from a filling or matter made by the injection of molten matter in such a cavity or fissure."

Q. In other words, I take it that any fissure or break or contact which contains any other matter or
409 filling will constitute in the geological expression, a vein?

Q. What is the other name? A. Well, dikes, sills, laccolites, batholiths.

Q. Now going away from the geological definition, did you discover upon that ground what you as ~~a mining man would consider a vein or lode?~~

a mining man would consider as a vein or lode? A. I did not, as a **commercial proposition,** which I would locate with the expectation of getting **commercial returns.**

NOTE: (This answer is inserted here as being more significant for what it concedes than for what it denies.)

SECTION 409. That part of this witness' cross-examination at record pages 412-418 which relates to the lodes and veins on the Midas lode claim (adjoining the Salt Lake No. 3 on the south) we omit, in order not to unnecessarily prolong our brief, but by reference to those pages the court will see he is still harping on commercial values and commercial returns, or a commercial vein, which things the law rejects as a test of locatability of mining ground. But herein he proceeds, at record p. 431:

Rec. Page

431 I believe I said, that a vein is a **mineralized fissure** or filling or fracture in the country rock, with the qualification that have been made by either hydrothermal or gaseous action.

speaking from a geological standpoint, that filling should

XQ. But in simple language, it is different material than the surrounding country rock on each side of the opening, isn't it? A. Well, it usually is, yes.

XQ. It must be mineralized in order to be a vein? A. Yes.

XQ. It is a fact that wherever there are fractures or shear zones, the mineralizing waters may flow and deposit mineral, isn't it? A. True.

XQ. Anywhere there is a fracture, whether it is in sedimentary rock or in igenous rock? A. Yes, sir.

XQ. Mineralizing waters may flow and deposit ore by cavity filling or replacement, or interstitial

filling, or impregnation, is not that right, to use technical language? A. That is correct.

XQ. So it is not impossible in these fractures on these claims, mineralizing waters may have flowed, which desposited mineral values? A. **They may have,** but I am rather in doubt if they ever did, because I didn't see any evidence of it.

SECTION 410. Considering this testimony, of Mr. Boyle. He is a mining engineer, and at record pp. 406-407 he says he did see lodes and veins exposed on this ground, within the geological sense or meaning, elsewhere than that in the Midas Tunnel. Asked what the geological definition of a vein was (which would also therefore be a definition of what he saw) he says it was

"—a deposit filling a fissure in country rock supplied by hydrothermal or pneumatolitic agencies, as distinguished from the injection of molten matter into such cavity or fissure."

"Hydrothermal or pneumatolitic agencies." Boiling these terms down a little, we have *hydro* and *thermal,*—hot water; and pneumatolitic,—pertaining to the mechanical properties of elastic fluids, particularly of atmospheric air, (Stand. Dic.),—in other words, the volatile or gaseous forms of heated water and air,—vapor. These vapors forming in the depths of the earth where the heat and the water unite to make hot water, gas and vapor, combined with the chemical properties of the metals, force their way up through the cracks and crevices of the earth, and through porous rocks and

other material pervious thereto, where upon cooling the metalic elements become precipitated and remain to constitute the lodes or veins, together with the other material which constitute the gangue or vein filling substance. The lighter, gaseous, and volatile elements evaporate or drain away through the cracks and interstices, porous rocks and other pervious material. This the books show to be the most common formative cause of mineral-bearing veins. We need not cite the geological books generally. We will refer only to Mining Co. vs. Mining Co., 83 Pac. 648-676, wherein the court takes notice of this subject, thus:

SECTION 411.

"Vein-making fissures have been formed,

By contraction or drying as in argillaceous stratum; or, on cooling from fusion; or,

By subterranean movements, pre-eminently those which have attended mountain making;

By the disruptive or expansive action of vapors resulting from volcanic action; and

By corroding vapors or solutions from the deep, which sometimes enlarge the fissures, especially where the rock is limestone."

(Quoting from Dana on Geology.)

Also:

"Fissures formed through volcanic action, and enlarged by corroding solutions or vapors, are deep-seated, and frequently contain large cavities." Id.

"Fissure veins have many characteristics. They are the fillings of fissures or openings of the country rock, of all kinds of rock of all ages, containing different kinds of material, in some respects agreeing with, in others differing from the country rock; the most common material being quartz.

"The fissures have selvages and slikensides, and the gangue material is generally easily distinguished from the country rock.

"Fissure veins are simple or banded, according to their structure as to minerals. Some continue in the same direction; others are irregular and change their courses.

"Some have a continuity of ore, while others are barren in places, and still others are faulted.

Id. 83 Pac. 648-676.

SECTION 412. It seems perfectly intelligible that, when the mineral-bearing solutions ascended from the deep and circulated through the main fissure or series of fissures, they were, by pressure or other of nature's processes, forced through the crushed and shattered rock and loose brecciated material, and that by metasomatic action of the solutions the mineral was deposited as far as the rock or material was thus physically prepared for the passage of those solutions.

G. C. Min. Co. vs. Mammoth Min. Co., 83 Pac. 648-679, col. 1.

See also the geological works cited in the

opinion in Book vs. Justice Mining Co., 58 Fed. Rep. 107, at page 121.

SECTION 413. The method of filling by the injection of molten matter into a fissure or cavity seems to be the less common mode or formative cause, in most localities, as where an earthquake or other severe upheaval causes a vast fissure in the earth's crust, extending down to immedaite contact with the subterranean cavities toward the earth's center, where from the intense heat there may be something like liquid fire. This liquid fire may contain in a molten state some or most of the chemical properties of the rocks and material surrounding it, and when a fissure opens, is injected into it in the molten state, and may extend to or near the earth's surface. The geological books throw much light on this subject, and it is this distinction we understand the witness sought to make. He saw none of the latter kind of veins or fissure fillings, since they do not fall within his geological definition; but he did see the former, since they do fall within his description of how the veins occurred. At record page ~~429~~-431 he was asked again about his definition of a lode or vein, and he makes it clear:

> "I believe I said that a vein is a mineralized fissure or filling or fracture, with the qualification that speaking from a geological standpoint, that filling should have been made either by *hydro-thermal* or *gaseous* action."

also that it is different material than the country rock on each side of the opening, and mineralized. And that

wherever there are fractures or shear zones, the mineralizing waters may flow and deposit mineral, no matter whether the fissure is in rock that is sedimentary or igneous in character. And that the mineralizing waters may flow and deposit ore by cavity filling or replacement, or interstitial filling, or by impregnation. (Recd. p. 431-2.)

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The intent of the U.S. Mining Statutes is not to make distinctions based upon genetic principles. What geologists may call beds of ore the courts may find to be lodes within the U. S. Mining Statutes authorizing the locati of mining claims upon the public domain.
Alameda Min.Co. vs Success Min. Co. 161 Pac. 862-5

and tell wnat the chemical and metallic elements are there. He admits that there is a splendid lode only 500 or 600 feet away. (Record p. 182.) He and the other witnesses have testified repeatedly that neither they nor any man can tell the values in rock by looking at it, without tests and assays. And even granting that the rock within the fissures at the surface point where he chanced to look, *were barren*, this is nothing against its lode and vein character, as we have repeatedly shown from the decisions. It may be better a little further on, a little lower down on the vein, since no vein yields pay ore from the grass roots, as they testified, and as the

court knows without testimony. It need only be such that the miner can follow expecting to find ore.

SECTION 415. In weighing this witness' *"doubt,"* we must remember that the burden (even if the issue is open at all), is upon the plaintiffs to disprove prior mineral discovery in the lode claims, in order that they may have the ground as junior locators. To do this, they try to prove by recent visit to the ground, that no lodes or veins exist. To ~~do~~ this seems next to impossible, when you have the admitted existence of the fissure or crevice, seam, etc., and the enclosed material differing from the country rock, since no man can tell what mineral values such a fissure has lower down than the surface or point where it has been opened, and the law does not require more than perceptible values at the surface, or at any *one point* on the surface. But whatever their theory, it is upon them to do what they set out to do. Instead of disproving the existence of veins now, they testify to the existence of most, or all, of the characteristics of lodes and veins,—the physical facts which in law constitute veins; i. e., the fractures having width, the wall rock, and the enclosed material of different character. And also that they are mineralized in some degree, since Boyle says they would not be veins, without mineralization (Record p. 431). If this leaves anything out, we do not know what it is. But since Mr. Boyle still said he doubted that mineralizing waters had deposited ore here like they would in other fractures, we must say, that to doubt a thing is not to disprove it, or prove it either. Its entire absence

is that upon which they rely for success. To leave such a point in doubt is to fail.

See Bell vs. Skillicorn, 28 Pac. 768-771, col. 1.

SECTION 416. Their witness Moran even admitted the discoloration in these fissures was caused by water but would not say whether they were mineralizing waters. (Record p. 375-6.) Yet as he made no chemical or other tests of the discolored material or oxide, it is not shown that he could or even undertook to decide whether the waters which caused the discoloration were mineralizing or not,

Insert.

nor whether it was water at all, instead of gases, pungent vapors &c which constituted the ~~mineral~~ discoloring agency.

.... case, viz.: a fissure filled with material different from the wall rock, with some barren places and some rich spots or streaks. We don't care a thing about it being solidly rich from one side to the other of the fissure, nor from end to end of our claim, at the surface, so far as our right to locate upon it is concerned.

SECTION 417. Going back now to Mr. Boyle's distinction between veins that were formed by waters and gases, and those formed by injection of molten matter, which latter he said geologists call by the name of "dikes," "sills" and some other things. At record page 258, their witness Ray says "dikes" run all through that

country, from which it would appear there are some molten veins also, if Ray had the same distinction in mind. And their witness Van Orman speaks of the formation at one point on these claims being discolored by the *gaseous fumes emanating throughout that region.* (Record p. 245.) This points to Mr. Boyle's theory of formation of most of the veins, by hydrothermal or gaseous action. So we have the veins in either event. And while they have a sample taken here and there, not necessarily in the vein, but *"in the cut"* which gave no assay results, this is nothing against there being a vein, as we have shown.

SECTION 418. But we are not concerned nor interested in how these fissures were filled, whether by gases and vapors and percolating waters, or by injection of molten matter. It is only their existence that we care for, and they may speculate upon their origin all they wish. Give us the gangue matter, the vein filling of different character, and appreciable mineralization in some parts of the vein, or a failure to disprove mineralization in some portions of the vein, or a failure to disprove that the fissure and filling were such that *a miner might follow expecting to find ore* sufficiently valuable to work,—and they may have the remainder if there is any.

SECTION 419. So it comes back to the question which we discussed before (Secs. 385-407 ante) that they are demanding mineral values at the surface, and at a particular point on the surface at that, where they happened to take a sample, which shall be of commercial value and be *pay ore.* This is not the legal test of the right to locate ground, and for that reason their testi-

mony is insufficient, and the verdict and judgment against the law. As it stands, the verdict and judgment went against us below, because the witnesses required more of use than the law does, as a basis of right to locate the ground years before they came on the ground.

(I) COMPARISON OF TESTIMONY FOR PLAINTIFFS AND DEFENDANTS BELOW, AS TO EXISTENCE OF LODES AND VEINS. SAMPLES, ETC., CONSIDERED.

SECTION 420. *In General.* The general nature of the testimony of the witnesses for Plaintiffs below relating to the existence of lodes and veins within the Salt Lake No. 3 lode mining claim, has been considered in previous sections of this chapter. It has been seen that this testimony is not based upon the conditions on which the lode locators made their discoveries and location of these claims, and cannot effect the degree of prudence exercised by the locators.

That their testimony consists chiefly of opinions without disclosure of the physical conditions even at the time and place they made their visits and inspections many years after the locations, and they for the most part do not specify as to the physical elements of a vein or lode, viz.: the enclosing walls of country rock, the enclosed fissure filling of different material, its continuity within which a miner might prospect and develop

in expectation of finding ore that might pay to work, or other physical indicacia.

That to the extent they do mention or specify physical conditions, they coincide with those conditions which the courts recognize as the ordinary or common constituents or incidents of valid lodes and veins within the statutes, and amount to a confirmation of the existence of such lodes and veins in our ground, and not to disproof of their existence.

SECTION 421. That whatever negative answers they returned to their counsel's questions whether they had seen veins or lodes within their understanding, experience or definitions as miners, was colored, shaped and invalidated by their mental reservations and provisos to which they later testified, that in order for the conditions which they saw to constitute lodes and veins within their term of it as miners or mining men, the rock or substance at the point inspected by them, and where they took their sample, must contain mineral values in excess of $7 or $8 per ton, at or very near the surface, or have pay ore or commercial ore, or yield commercial returns, and the like expressions, without further or additional development. And without this the ground could not be validly located as lode claims. Which assumption as to values the law condemns, and invalidates their opinions as to lodes or veins resting upon it.

SECTION 422. It follows from these results, that their specimens of rock, and from which they made their assays, having been selected by them from certain points

only, and without the confirmatory proof indicated above and necessary in order

1. To identify it as a part of that which influenced the location to be made;

2. To identify it as part of the fissure or crevice fillings between walls of country rock;

3. That there were no better mineralized materials within the walls of the fissures in question, than the samples; or

4. That the fissures or crevices in question were not such that miners might legitimately follow them, expecting to find ore;

are also incompetent and insufficient to support a verdict or judgment on the ground of no prior mineral discovery within the lode claims, and should be rejected even from consideration in that behalf.

SECTION 423. For even if we concede all they testify regarding such samples of rock, viz.: that they took them from this or that open cut, shaft or opening on the ground; and if we further concede that which they do not testify, viz. that the samples so taken from within the cuts or openings, were also taken from material that was in place within the walls of the crevices or fissures therein, and so entitled to be denominated as vein matter or fissure therein, yet it is not shown that there was no better material within such fissure fillings and between the walls, from which they might have taken a sample and secured better values. Nor was it shown that they took repeated samples within the walls in

each cut, shaft or opening, so as to make their search for values exhaustive so far as the fissures were visible in each cut or opening. Nor that they exercised the same diligence and zeal in seeking to find mineral values, or vein or fissure continuity between walls that a miner or prospector exercises when locating or determining to make a location: Nor that they exceeded the diligence in this respect of one who has a financial interest in not finding such values or continuity between walls of country rock.

SECTION 424. Nor did they testify that the fissures or crevices, seams, etc., up to four feet or more in width, were not continuous; nor that a miner might not by developing and following that lead, fissure, crevice, or zone (which means labor, blasting, and time), legitimately expect to find ore that would be suficiently valuable to work. Nor did they show that the samples they took were not from such a barren spot or point as every vein or lode is liable to have, as the decisions show, and without affecting the existence or identiy of it as a true fissure vein, upon which a valid location might have been made. (Secs. 369-376, 389-407, 181-186 hereof.)

Without these things are cleared up, it cannot be said there is evidence or proof of the non-existence of the vein or lode, nor that there was no prior discovery made either in those fissures or in some other on the claims, and either in those openings or in others, seeing that the veins and fissures come up to the surface of the ground. Taking a barren sample of rock from one spot, inside or outside the vein, is not proof that a better sample cannot be, or has not been taken from

another spot within the vein, further on, or up, or down, or sidewise, from the point of the barren sample. Their own witness even took a sample which gave an assay from the same cut or opening in which the same or another of their witnesses had taken a barren sample. (Sec. 436, post.)

SECTION 425. Bearing these things in mind, we will now consider first what testimony was offered and given in evidence by the witnesses on our side (defendant below) upon those points upon which their witnesses were silent as pointed out in Secs. 363-368, 377, 415, 421, ante; and second, show the samples and assays taken by our witnesses from the various cuts, openings and places on this ground, and the values that their witnesses might have obtained if they had been more diligent, or sampled from the same points within the veins that defendant's witnesses sampled from.

SECTION 426. *Defendant's Witnesses.* Their testimony upon these points is abstracted in full within Secs. 493-501, post and seq, to which reference is made. Citation is there made under each section to Plaintiff's testimony as to that cut, for convenience in comparison. From the testimony of Defendant's witnesses, we quote as below regarding the physical conditions, vein characteristics and indicacia, on the ground within the Salt Lake No. 3 lode claim, which is supplementary to and not in conflict with the testimony given by Plaintiffs' witnesses at the trial.

SECTION 427. *Open Cut on North End Salt Lake No.* 3.

(No. 1 on Plaintiffs' Map, Exhibit A.)

(No. 9 on Defendant's Map, Exhibit 5.)

PARKER LIDDELL testified:

Rec. Page

544 Mining engineer and U. S. deputy surveyor.

753 Went over the ground in these lode claims May 8, 1915, and examined rock in place; also spent a month there surveying the lode claims in June, 1913.

764 On the mill road grade about 200 feet NW from the mill, I found a quartz vein on which a shaft had been sunk about 8 ft. deep, inside the road grade. Vein shows down in shaft and distinctly above the collar of shaft on grade of road; remember seeing
765 the vein there running diagonally across the road earlier than Sept. 1913. Distinct quartz vein, could see the quartz material in it, and the fractures which represent the walls. Probably 8 or 10 inches wide there.

831 Took two samples there. Road grading cut out portion of the vein, so you could see it in road bank. Samples taken near bottom of the shaft, over a 36-inch width at bottom of shaft; I picked from one wall to the other and took average sample, and assayed it. Assay shows mineral values $1.37. Offered in evidence, objection, sustained, rejected. The other sample 82 cents also rejected, because not shown exposed before Sept. 1913.

BENJ. F. TIBBY testified:

Rec. Page

539 Is mining engineer and geologist.

889 Visited the Salt Lake No. 3 et al mining claims Feb. 18-21, 1915. Made thorough examination of surface and workings.

899 Took two samples from this point.

902 I traced the vein up side of shaft to surface, but not beyond; no surface soil covering it there (at mouth); extends up to very edge of shaft; and to point where road is. Vein is visible on both sides of bottom of shaft; well defined walls and soft heavily iron stained matter.

904 Took my samples Nos. 9 and 10 from this shaft.

1164 Sample No. 9 assayed $3.50 and No. 10 assayed $8.21 in gold silver and copper.

JOSEPH RALPH testified:

956 Noticed the veins along the roadway grade on Salt Lake No. 3 in 1912; not sure whether its the vein on which the shaft now sunk or not; there are numerous little veins along the road-side there but the bigger one on which the shaft is sunk is valuable. Its strike almost parallel with the roadway. Have seen its width and strike, as it approaches the inner
964 wheel track, and then broke across the road. Width on roadway should say 4 to 10 inches. Will carry values, yes.

(Condensed from Sec. 505 post.)

Showing left-hand wall and part of the 4-foot vein exposed within the open-cut on Salt Lake No. 3, designated as "2" on Plaintiffs' map, Exhibit A, and as "14" on the Defendant's map, Exhibit 5. (Map Sec. 8, ante.)

SECTION 428. *Open Cut North End Salt Lake No.* 3.

(No. 2 on Plaintiffs' Map, Exhibit A.)

(No. 14 on Defendant's Map, Exhibit 5.)

PARKER LIDDELL testified:

Rec. Page

544 753 Mining engineer and surveyor. On ground surveying a month in July, 1913 and again May 8, 1915.

816 820 On May 8, 1915, I examined this open cut, in which there is a 4-foot vein. When there before Sept. 1913, there was an outcrop here showing a plane or wall indicative of a vein or lode; simply a wall or plane of movement filled in with eroded soil and dirt. On May 8, 1915, took my sample No. 1 along east face of this cut about 2½ feet below surface of ground. The vein in which I took the sample extends to the surface, yes.

823 The two samples assayed:—No. 1, .10 oz gold; .86 oz. silver; copper, trace; total value, $2.43; No. 2, .04 oz. gold; 1.46 oz. silver; copper, trace; total value $1.53.

JOSEPH RALPH testified:

965-6 I knew of an outcrop at this point before the jumping. It is hard to distinguish impressions received before and after that time. All I can say is there was enough to have justified me in running in and finding that four-foot vein.

971-2 In Sept., 1913, there were only croppings; now

Rec. Page

there is a cut 4 or 5 ft. wide, 12 foot face and 15 ft. long, and a 4-foot vein. There is an overburden on hanging wall of the vein of about 1 foot. A little solid formation of same material above it. The lode goes to the surface.

BENJ. F. TIBBY testified:

892 I took photograph of the vein matter or material here, took it standing near mouth of cut looking to face of it, representing from a little below surface, left hand corner part of this wall, and part of face.

893 I did not trace vein beyond edge of cut on surface; vein exposed within the cut reaches up to the 3 or 4 inches of soil on top. Photograph represents part of vein—the conditions at that point. Taken Feb. 18th, 20th, 1915, by myself.

899 and 904 I took 4 samples from this cut, Nos. 13, 14, 15, and 16.

1160 The Court ruled to admit the assays.

1164-65 Sampes No. 13 assayed $2.84; No. 14 $5.88; No. 15 $9.78; No. 16 $11.14.

892-3 Defendants photo exhibit ..o. 45 of this cut opposite showing one wall and part of the vein, admitted.

(Condensed from Sec. 506 post.)

Vein or lode 15 inches wide extending up to grass roots at surface, in "Mill-Cut," on Salt Lake No. 3. (See map, Sec. 8, ante.)

SECTION 429. *Mill Excavations or Cuts N.E. Part Salt Lake No.* 3.

("Mill Cut" on map Plaintiffs' Exhibit A. "21" on map Defendant's Exhibit 5.)

PARKER LIDDELL testified:

Rec. Page

749 When I was on the ground May 8, 1915, the cut just west of the mill building had been run and exposed the actual formation, also exposed the vein. That is down quite a few feet below the mill-road on Salt Lake No. 3. In the lower mill excavations the rock was in place, and in the face of that cut a vein was exposed.

864 That cut is not in the mill building, but outside
762 & behind this tank where I took a sample, shown as
763 X on photo Ex. 3; the sample ran $3.36 a ton.

The vein at this point is well developed, was in the face practically in center of cut. Assay certificate Defendant's Exhibit 15.

BENJ. F. TIBBY testified:

892 I took a sample from the bank just below the mill cut, point 21.

895 I found in there a vein a foot thick, very strongly marked, abundant oxide of iron; flanked by country rock; is soft and easily picked, broken up, and con-

Rec. Page

tains inclusions of wall rock is small pieces. That is
896 soft, porous, broken up material within the hard wall rock.

I took a photograph of exposure at this vein; photo admitted in evidence as Defts. Exhibit No. 20. The pick shown in photo with the handle is 12 inches long, laid in there to compare width of vein; photo shows the vein exposure.

I took an assay of that vein material, across 9 or 10 inches width of vein, and 4 or 5 inches wide, 2 or 3 inches deep, cutting a channel across full face of vein; I picked in several inches before taking sample. Total values assayed $4.60 in gold, silver and copper.

It is a mineralized vein there, with all the essential characteristics of a vein—two solid walls enclosing material of different character carrying appreciable values, etc.

JOSEPH RALPH testified:

885 and 888 960 I knew of those excavations back of mill in 1912; work done in 1912; found that vein when the excavations were made in 1912, at point "21" on defendant's map, Exhibit 5.

Also knew of the vein behind the leaching tank before the claims were jumped, west of the mill; mill faces it.

961-62 Photo, Defendant's Exhibit A, shows position of the vein by X opposite. Vein 15 inches wide at

widest at bottom, and narrower about 10 inches at top. Yes, it would carry values.

LIDDELL recalled:

Rec. Page

1197-8-9 and 1200 The vein was about 9 feet high in this cut and one foot wide. The sample I took was over 32 inches I believe, all vein matter. The direction of the vein northerly and southerly; excavation runs NE, and face exposed southwesterly.

See Defendant's photo Exhibits No. 20; also Defendant's photo Exhibit No. 28, opposite.

(Condensed from Sec. 508, post.)

SECTION 430. *Mill Road Excavation.* This is the road referred to in Sec. 275 ante, and on the map exhibit A (see map Sec. 8 ante), connecting the mill on east line Salt Lake No. 3 with the road in bottom of the Canyon near end of the Salt Lake 3. The witnesses say this road was excavated by blasting through solid rock throughout for 300 to 350 feet in length, and in so doing veins, seams, and general fissuring of the country rock was disclosed.

JOSEPH JUREY testified:

885 I knew of the vein along the road to the mill on Salt Lake No. 3 in 1912. There are several small veins around in there, but this one in particular. The excavations for the mill and the road was done in 1912.

BENJ. F. TIBBY testified:

Rec. Page

900 I examined the road to mill, yes.

901 Along the NE bank of the road, upper side, are indications of fissuring at several points.

JOSEPH RALPH testified:

956 The first thing I noticed on the Salt Lake No. 3 were the veins on the roadway in 1912, not sure the one on which shaft is sunk now is one of them or not; as you go along the road there are numerous little veins exposed by the road, but there is a bigger vein on which the shaft is sunk, which is valuable.

958 Have seen that vein here, and here, its width, dip, strike; coming along there to approximately the inner wheel track and then broke across the road and is hard to trace.

975 In addition to that vein, along there at frequent intervals the whole thing is fissured, seamlets—others from which you take values undoubtedly, and that is characteristic. The road cross-cuts the country form-

976 ation, doesn't run with it, and every vein apexing within the 300 or 350 feet is exposed there. On each side these veins will come up. I never attempted to trace them back.

PARKER LIDDELL testified:

1197-98 Q. How many veins are exposed at the road?

A. I don't know how many; they were a horizontal

distance of 5 or 6 feet, vertical 2 or 4 feet, and whatever width the vein happened to be.

(Condensed from Sec. 509 post.)

SECTION 431. The defendant's witness Benjamin F. Tibby who testified at the trial to the vein and lode conditions on these lode mining claims, qualified magnificently as a scientific witness and mining expert, possessing University degrees in Geology and Petrology besides ample practical mining experience, engaged in practice now as a Consulting Engineer (Sec. 502 post). He testified in extenso to the scientific, petrological, chemical and photographic tests and processes to which he had subjected the samples of vein matter taken by him from the vein or fissure fillings on these lode claims, and his reasons for pronouncing them true fissure veins (record citations in Sec. 503). He also took a couple of photographs at convenient points of the vein or lode itself in place within the open cuts, disclosing the walls of the veins and included material of different character, which are Defendant's Exhibit Nos. 2[illegible] Record 961-2; 45 Record 1166, reproduced at Sections 428-429 hereof. One of them as the copy and original exhibit itself shows, extends up to the grass roots at the surface, and at record page 893 Mr. Tibby testifies that the vein exposed in that cut extends up to the 3 or 4 inches of soil on top.

There was absolutely no contradiction of this witness upon any of these points, and he was excused with practically no cross-examination. (Record p. 940.) And no witness was produced by Plaintiffs at the trial who

attempted to occupy his field as a scientific man and petrologist, or to give countervailing testimony.

(J) THE TESTIMONY CONSIDERED WITH REFERENCE TO THE RULE AS TO CONFLICTING EVIDENCE, AND THE RULE AS TO SOME EVIDENCE TO SUSTAIN A VERDICT.

SECTION 432. *In General.* The general rule of decision in appellate courts, that a verdict or findings of fact below will be upheld, where based upon competent and conflicting evidence within the issues, or where there is some evidence of a nature to sustain the verdict or findings, has no application to the condition of this record. If otherwise, we would not be artless enough to bring the case here, depending for success upon a reversal or relaxation of those rules. z

The rule would not require mention even, had we not heard it appealed to by opposing counsel as a solvent or corrective for all the errors of which we complain. So we must consider, within the purview of this chapter:

1. Whether the evidence or testimony is within the issues.

2. Whether it is competent or sufficient on behalf of the plaintiffs to sustain a verdict in this case that the ground was non-mineralized to such an extent that no discovery could ever have been made in the lode claims.

3. Whether such testimony, its truth being

granted, is logically, or physically inconsistent with the truth of the facts testified to by defendant's witnesses.

Without these three conditions exist there is no conflicting testimony, but the verdict and judgment must conform to a consistent statement of all the evidence as a whole.

SECTION 433. As we have seen in previous chapters, conditions 1 and 2 *supra* do not obtain, while as we have seen in this chapter they have not disproved mineralization to such an extent as to preclude or render either impossible or improbable mineral discoveries in each of the lode claims at the time of their location, according to the burden that was on them, but on the contrary the testimony of the locators John Jory and Joseph Jory, the employees, regarding the facts of discovery remains undisputed, and the sufficiency thereof and of the location certificate as imputing discoveries is legally established (Secs. 179-180a, 195-197 ante).

SECTION 434 To be specific, regarding *the present showings and exposures,* let us recapitulate as to the legal definition of a lode or vein under the decisions, and then compare both plaintiffs' and defendant's witnesses testimony as to the constituent facts within such definition.

THE DEFINITION:

1. A fissure, crevice, or seam between walls of country rock.

2. A filling composed of material of different character, containing appreciable values in the metals.

PROVIDED, these appreciable values need not exist at any specified point on or near the surface of

the ground. The vein at the surface need have only a present or prospective value. The fissure need only be such as a miner can follow and *reasonably expect* to find ore valuable enough to work.

PLAINTIFFS' TESTIMONY:

1. They are usually silent, and say nothing, whether they did or did not see the fissures or crevices.

2. When not silent, and to the extent they do detail the physical conditions, they admit the existence of this essential of veins at the different points.

3. As to *values in the metals,* they give their opinion that no lode or vein appears at certain points only on the ground, within their definition of the term as miners; with the proviso that nothing can be a vein or lode, without VALUES:

(a) In excess of the law's requirements.

(b) So evenly distributed throughout the open cut or shaft where taken, that a barren sample could not be taken from such a cut, shaft or opening, such as they took.

(c) In excess of the values in their sample at every point in the cut, whether within or without the walls, or boundaries of enrichment.

(d) The vein matter itself must be so evenly mineralized at all points between walls within its strike and dip as to preclude a barren sample.

These requirements as to a locatable vein do not tally with the law.

DEFENDANT'S WITNESSES:

1. The fissures exist, with walls, strike, dip, filling of material different in character and appearance than the country rock outside the walls.

2. The vein or fissure fillings contain appreciable values in the precious metals, exceeding in value the country rock which encloses or flanks the veins.

3. That the samples so assayed were fairly and evenly taken over the full width or depth of the veins at the points and in the openings or exposures where taken.

No witness for Plaintiffs testified contrarily to either of the facts so testified by Defendant's witnesses.

THE RESULT: No fact or circumstance testified by any witness is inconsistent with any fact or circumstance testified by any other witness; nor does any witness dispute any fact or circumstance testified by the other. It is only in their conclusions and reasoning that they differ. And this difference in conclusions is caused only by the fallible and illegal standard of values adopted by Plaintiffs' witnesses, viz.: values approximating commercial ores at the surface and so prevalent and evenly distributed throughout each cut, tunnel, or opening, and on the surface, that they could not have taken a sample of rock within or about such cut or opening without obtaining a mineralized sample and assay or panning. The

values must be so universally diffused throughout as to preclude the possibility of a barren sample being taken *within* or *at* a given cut, tunnel or opening.

A barren sample at one point in an opening, and a demand for commercial ore throughout at the surface, is the basis for their adverse opinions.

SECTION 435. *Samples and Assays.* With these points in mind, the individual samples and assays taken by Plaintiffs (usually one or two samples in each opening) are not entitled to rank with those taken by Defendant's witnesses as evidence of the existence or non- existence of mineral values in the cuts or openings and within the veins or fissure fillings were taken.

1. Because Plaintiffs' witnesses in many or most instances ignore the existence of walls (i.e. boundaries of probable enrichment), and simply say they took their samples at or within the cut or opening in question.

2. Because if we admit their sample in each instance was taken from the fissure filling (to which they do not testify), yet a barren sample taken at one point within a vein, is no proof of general barrenness throughout, and is no proof that a sample yielding a substantial assay in the metals cannot be or has not been taken from another point or points within the vein, and within the cut or opening in question.

Neither side disputes by any testimony to the contrary, that any witness took a sample and obtained the assay testified by him to have been taken and obtained,

at the time or place so testified. Therefore the testimony of each witness stands uncontradicted and undisputed, that he did take such and such sample, at such or such point, and either within the vein walls or within such opening as the case may be, and that such sample yielded in fact the assay in gold, silver and copper to which he testified, and which the certificates show.

SECTION 436. *Samples and Assays,* continued. This being true, and the testimony of witnesses for both sides being not inconsistent with each other, but consistent and co-existent in fact, we need only ascertain the result and apply the law.

The samples taken by the witnesses below for both sides yielded the assays shown below. It being remembered that by their testimony Defendant's samples were taken from within the vein and of the vein matter itself fairly and evenly sampled; while Plaintiffs' samples were taken as their witnesses testified, either *in* or *at* a given shaft, open cut, or tunnel, but not within the vein itself, so far as testified:

THE SALT LAKE NO. 3 LODE CLAIM.

(Assay Values of Samples Taken and Assays by)

No. of Opening on Map, Ex. A.	Plaintiffs' Witnesses.	Defendant's Witnesses.
Shaft or Cut No. 1	Phillips No. 1, trace Phillips No. 2, $1.34	Liddell, $1.37 (rejected) Tibby, No. 1, $3.50 Tibby, No. 2, $8.21
Open Cut No. 2...	Phillips, trace	Liddell, $2.43, $1.53 Tibby, $2.84, $5.88 Tibby, $11.14, $9.78
Mill Cut or Excavation for Tanks	Boyle, trace	Liddell, $3.36 Tibby, $4.60
Long Cut or Excavation for Mill-road	Phillips, trace .... Phillips, $0.63.... Healey, 0.0.....	General fracturing and fissuring. No assays made.
This table made from testimony cited in fra	Secs. 493-501.....	Secs. 427, 428, 429, 430 Secs. 502-509

SECTION 437. It will be noticed that all the above assay values are from samples taken at the surface, or practically at the surface, yet as their own witnesses testify, lode values are not complete at the sur-

face, and all mines don't pay from the grass roots. Here are two open cuts or shafts, not over 8 or 10 feet deep from the surface of the ground on Salt Lake No. 3 at the points designated by 1 and 2 on their map Exhibit A, from which samples assaying as high as $8.21 in one and $11.14 in the other opening; while in the Midas tunnel on the Midas ground adjoining, samples taken from 25 to 50 feet of the portal of the tunnel, run to $11.87 a ton.

SECTION 438. They cannot assert that their mere production of a barren sample or assay from a given cut or opening, or *at* the opening makes a conflict of testimony with another witness who took a sample from a different spot in the same opening and between the walls of the vein and obtained values, so that both could not be telling the truth. It is quite reasonable and natural to expect that the same opening, or the same vein even, will yield both barren and productive samples and assays. See Sec. 369-376, 389-407 ante. The testimony of neither witness casts suspicion on the veracity of the other because they obtained dissimilar samples and assays within the same vein or open cut. Their own witness Phillips obtained both a productive and a barren sample from the mill-cut or excavation and also from Shaft No. 1 on the Salt Lake No. 3 in the preceding section. If the rule invoked could obtain, his whole testimony must be rejected because he impeached his own veracity by testifying to both a barren and a productive sample taken from the same opening by himself. On the contrary the "fish story"

would occur, if any witness were to say that any vein is evenly and solidly mineralized throughout its entire width, strike and dip. The more so if he swore that any shaft or open cut in the ground or country rock is evenly mineralized regardless of the walls or limits of the vein or area of enrichment. It is the duty of courts and juries to reconcile all the testimony if reconcilable and consistent rather than arbitrarily to reject any testimony.

SECTION 439. For the reasons stated the testimony given by their witnesses and our witnesses is not conflicting, wherein one witness obtained assay values and another did not, or wherein their own witness obtained both barren and productive assays from the same and different openings on the ground. And it is not *within the issues* because neither non-mineralization nor non-discovery is charged in the complaint as a ground of invalidity of the Salt Lake No. 3. For which reasons, the rule as to conflicting evidence, and some evidence, does not apply.

SECTION 440. The courts are not bound by the reasoning of a witness, nor the mental processes by which he reaches a given result or conclusion. If one of his facts or conclusions stated, show his reasoning is unsound, his conclusion will be rejected, notwithstanding an appeal to the rule as to conflicting evidence.

SECTION 441. The following examples will illustrate our contention in this matter, by comparison of arithmetical and mining formulae:

1. If one witness testify that 2 plus 2 equals 4, and another or many others swear that 2 plus 2 equals 5, there is no conflict of testimony, but the law adheres to the correct result.

If one testifies that walls with included material of different character and higher value than the surrounding rock is not a locatable vein or lode, but a dike, sill, seam, fracture zone, or other name, there is no conflict, but the correct answer obtains.

2. If one or more witnesses testify they saw the factors 2 plus 2, or fissure filling plus walls of different character, but saw nothing which when added produces 4, or nothing which added produces lode or vein—his or their testimony will be rejected in favor of other witnesses testifying to the correct result.

In other words, the law makes the addition and declares the result, and discards the incorrect conclusion of one or many witnesses who say 5 is the answer, or who say they saw no vein.

3. If one or more witnesses testify without giving any factors, but declare they saw nothing which when added produces 4, or nothing which when added produces a locatable lode or vein, but that in any computation of 4 as a result they must have 5 as a factor—or in any calculation of the existence of a vein or a lode, they must have commercial ore or pay ore at the surface, or at any

specified point on the surface or beneath the surface—in either such case their testimony will be rejected and no conflict will arise between such testimony and that of witnesses who swear to the correct factors and also the correct result.

SECTION 442. If a witness swears that he will accept nothing as a lode or vein that may be located as such under the mining laws, which does not possess evenly distributed values amounting to a commercial deposit throughout the vein formation, and especially at the point where they took a sample (whether in or outside the walls), although there are walls and fissure filling, with strike and dip and apex, the matrix of the vein, the courts are not bound by his reasoning and there will be no conflict of testimony with other witnesses who do not indulge in erroneous reasoning, (within the rules we are considering).

It is not therefore every time an appeal is made to the rule as to *conflicting evidence,* or the *some evidence rule,* that such rule is held applicable.

SECTION 443. The following cases illustrate the point. If some fact is proven without dispute which is inconsistent with the result or conclusion reached by the court or jury, or if there is a failure by the party whose burden it is, to prove or disprove some fundamental point in the case, essential to his success, then the verdict or finding must be reversed, although one or more witnesses testified on both sides at the trial.

Smelting Co. vs. Sprann, 40 Pac. 198;
Smith vs. Ellison, 40 Pac. 502;
Banks vs. Graham, 50 Pac. 1083;
Jenks vs. Lehman, 43 Pac. 1045.

(K) SUBSEQUENT MINERAL DISCOVERIES TO THE ORIGINAL LOCATION.

SECTION 44. It further results from the testimony cited in Secs. 493-509 post, and the abstracts therefrom in Secs. 408-409, 427-430 and 436 ante, that regardless of the original discovery and the merits thereof as before treated (Secs. 178-195 ante), there have since occurred other abundant discoveries and exposures of locatable mineral lodes and veins within the Salt Lake No. 3 at Cuts 1 and 2, the Mill cut and in the Mill road cut, prior to the attempted relocation of the Davis claim in September, 1913. These as shown by the testimony were known to the owners and their agents and employees on the ground, in 1912 and 1913 prior to the Davis claim. (Secs. 504-509 Plaintiffs'; Secs. 498-501 Defendant's. Condensed and compared in Sec. 436 ante.)

If we needed to do so, we could rest the validity of the Salt Lake No. 3 as a lode location entirely upon these facts, regardless of any presumptions of law or testimony going to the sufficiency or merits of the original mineral discovery on the Salt Lake No. 3.

Both the time when and place where the original

discovery occurs on a mining claim is immaterial, if it precede the attempt of others to locate the ground.

Gibson vs. Hjul, 108 Pac. 759 (Nev.);
Cedar, etc., Min. Co. vs. Norwood, 67 Pac. 749; 91 Am St. 841
Erwin vs. Perego, 95 Fed. 608; or 93 Fed 608
Jupiter Min. Co. vs. Min. Co., 11 Fed. 666;
1 Lindley on Mines, Sec. 335 and cases cited;
Uinta Min. Co. vs. Min. Co., 119 Fed. 169; 57 CC
Tuolumne Min. Co. vs. Maier, 66 Pac. 863;
Treasury Min. Co. vs. Boss, 74 Pac. 888;
Sharkey vs. Candiana, 85 Pac. 219;
Whiting vs. Straup, 95 Pac. 849;
McShane vs. Kenkle, 44 Pac. 979;
Section 466, post.

(L.) SYNONYMS FOR LODES AND VEINS.

SECTION 445. *Fractures, seams, breaks, slips.* By many such names in the record have their witnesses made reference to the *veins and lodes* on the lode claims, and avoided the use of "lodes or veins" which might confess the terms of the statute.

But none of them have distinguished between their fracture zones, breaks, or slips, etc., and our lodes and veins, except in their effort to require a greater concentration of mineral values, which we have seen is vain. Their witness Moran said it does not consist in the width or size of the fracture or fissure. (Record pp. 363, 367-8, 369.) Values only stand for anything

with him. Their witness Phillips suggested at one time a difference in matter of width or size, but could give nothing intelligible as a test in this respect. For if so, and if a fracture, break, or slip is only a young vein, then at what width does it cease to be such and become a vein? For as Book vs. Justice Min. Co., 58 Fed., says, a true fissure vein has no uniformity in width, either in its strike or dip, but it may almost or quite pinch out in places, and again widen into extensive ore bodies. Is the same fissure a lode or vein at one point, and a break or fracture at another?

SECTION 446. If the other criterion be preferred, viz: the existence of values, then the cases we have cited show that there is no uniformity in this respect, but that values disappear entirely at places although the gangue or vein filling still continues in full width; while at other points the fissure filling may be either much wider or narrower, but rich values reappear. At what point in the fissure filling does it cease to be a vein and become a mere fracture, owing to the ascending or descending scale of values at that point?

SECTION 447. We notice, for that matter, that they call a vein which is 18 inches in width in the Midas tunnel a "break," "streak," fracture," etc. (Sec. 463 post.) What is the distinguishing feature there, which makes it a "break"? And another 15 inches wide, shown in our Exhibit No. 20, a photograph (Sec. 429 ante), is likewise called by them a fault or break. We wish the court will look at the vein in that photograph, and see what it is that they dissemble under the name of "break."

Is it a rich value at the surface, or a difference in appearance? No; they have suggested each of these and at once abandoned them on cross-examination. The law denounces both these hypotheses.

And there are four-foot veins on the Evening Star and Salt Lake No. 3, which they have called breaks, fracture zones and other mildly slanderous names. See Exhibit No. 45. At Sec. 428 ante, is a photo showing one wall and part of the vein exposed in the open cut No. 2 on Salt Lake No. 3.

(M.) CHARACTER OF THE COUNTRY ROCK.

SECTION 450. *Quartzite or Sedimentary.*. We will notice this subject, although it does not appear to have any relevance. During the trial, considerable time was devoted to discussions of the character of the country rock around about these mining claims. Their witnesses inclined to the theory that the country rock is quartzite, a sedimentary formation in its origin, combined with a high per cent of cementing silica, and perhaps another element or two. Moran, who is something of a surveyor, thought it was such, or something similar, though he was not so sure about, as he did not make a close test or any test (Record p. 370), and that it was so highly altered that an expert even could not tell by looking at it (Record p. 381). Mr. Boyle, their mining engineer, also believes it to be quartzite, his opinion being based on a book he had read, but didn't know what it was, as no one could tell without elaborate determina-

tions, and then he is not sure (Record p. 427), so highly altered is it from its original physical form or structure. Another witness, who qualified well as a mining and geological expert, classified the formation on the west side of the canyon as quartzite, and that on the east side as alaskite, a geological term for a certain kind of highly altered igneous rock, with a dioritic intrusion therein at one point on the Salt Lake No. 3.

SECTION 451. This is not a subject relating to the issues in any way, nor to that of lodes or veins, or mineral discovery, but the attorneys and witnesses seemed to get interested in the subject and allowed themselves to drift. It was terminated by the testimony of Mr. Boyle, their mining engineer, who stated:

> "If it is quartzite, it has nothing whatever to do with the value of these claims. The quartzite of both these ranges (referring to the Battle Mountain range and Shoshone range), if they are quartzite, as I believe they are, contain valuable mineral deposits"
>
> Record p. 428.
>
> "Anywhere where there is a fracture, whether in sedimentary or igneous rock, the mineralizing waters may flow and deposit ore by cavity-filling, or replacement, or interstitial filling, or impregnation."
>
> Record pp. 431-2.
>
> "I saw a very splendid lode mineral deposit on the Washington lode which is about 500 or 600 feet

easterly from the Guy Davis (or Salt Lake No. 3), that deposit dips away from the ground in ontroversy."

Record p. 433.

"The fractures are apt to dip in any direction. Let us assume, for the sake of argument, that this is quartzite, and that it was thrust up by agencies of different character—bent up—this huge mass of material several hundred or several thousand feet thick. It is not so inflexible that it could be thrust up in that shape, or thrust down by faulting, without cracking in a great many directions, and every one of those cracks represents a fracture zone that may dip in any direction."

Record p. 430.

See Secs. 282 and 283 ante.

SECTION 452. Only their witness Moran at one time said anything which might have any bearing on this subject, but later abandoned it. At record page 362 he said:

"it is possible to develop ore bodies in quartzite but it is not favorable to it."

Just what line of reasoning was in his mind when he said this no one knows, for he did not disclose. The seemingly logical inference from the expression would be that he was thinking about like this, viz.: Ore bodies do not pre-exist, older than man, or history, but are a sort of hot house growth that have to be "developed";

and to do this you must have the right kind of soil or environment, etc., an occasional shower, perhaps, and some care, nursing and cultivation. It won't grow or "develop" in the hard gritty quartzite. So, while it is possible to "develop" a mineral-bearing vein or lode in quartzite, the formation is *not favorable* to it. Or did he, perhaps, imagine that a layer or two of quartzite or silicious sandstone,—no matter whether altered till you cannot tell what it is or unaltered,—would prove an insuperable bar to the eruptive forces of nature which are able to bend up, break through, crumple up, shatter, crack and fissure through hundreds and thousands of feet or miles of more indurated material than quartzite, and in which the hardening element of silica is much more predominant than it is in the surface sandstone into which it has made its way from the regions below? Could nature be so confined? Or if not so,—seeing that Mr. Moran did not say it was impossible, how would he assist the process any, so as to *develop the ore bodies in the quartzite?*

SECTION 453. He cannot have used "developing" in the sense of improving, opening up, and shipping the ore. For he was doing his best to create the impression that there was no vein or ore body there, and it would be self-contradiction as well as giving their case away (and he was not hired for that), to use the word in that sense,—the only rational one.

The mining decisions show that veins and lodes occur in quartzite formations, as often as any.

"It is shown in the record in this case that

many of the most important mines in Shoshone County are found in quartzite."

Ambergris Min. Co. vs. Day, 85 Pac., Idaho 109-114, col. 2. Perhaps Mr. Moran might write and find how they do it in Idaho.

SECTION 454. But even Moran withdrew from his poorly conceived postulate, by saying that he was not sure that the country rock was quartzite, as he had made no tests, and based his opinion upon observation only; and that even an expert could not tell what the rock was by taking a piece and looking at it.

Under the circumstances, we need not pursue this subject further at this time. It is foreign to the issues, and can not contribute to the support or justification of the verdict or judgment, no matter what the geological classification of the country rock may be. No one on their side is very sure about it anyway.

(N.) THE SO-CALLED DISCOVERY POINT, AND THE CENTER LINE ON THE SALT LAKE NO. 3 LODE CLAIM.

SECTION 455. At Sections 496-497 post, we have abstracted certain testimony by the plaintiffs' witnesses at the trial to the effect that at or about the point on the Salt Lake No. 3 ground where the discovery point should be, and along the center line of the claim, there was only "wash" or mixed earth, rock and gravel,—no hard rock.

It is presumed that the theory of this testimony was along the line of trying to prove that there was no vein or lode of mineral bearing rock in place at the discovery point or other point along the center line of the claim which could have been discovered or the subject of a discovery at the time of the location of the Salt Lake No. 3 in February, 1897.

But if so, such testimony is unavailing and does not warrant the verdict or judgment, because the distance from such point or center line to hard rock is estimated only horizontally upon the surface of the ground, and they do not give the distance under or beneath the surface to hard rock formation, or the solid rock in place which constitutes the mass of the mountain, either at the discovery point assumed, or at any other point along the center line of the claim.

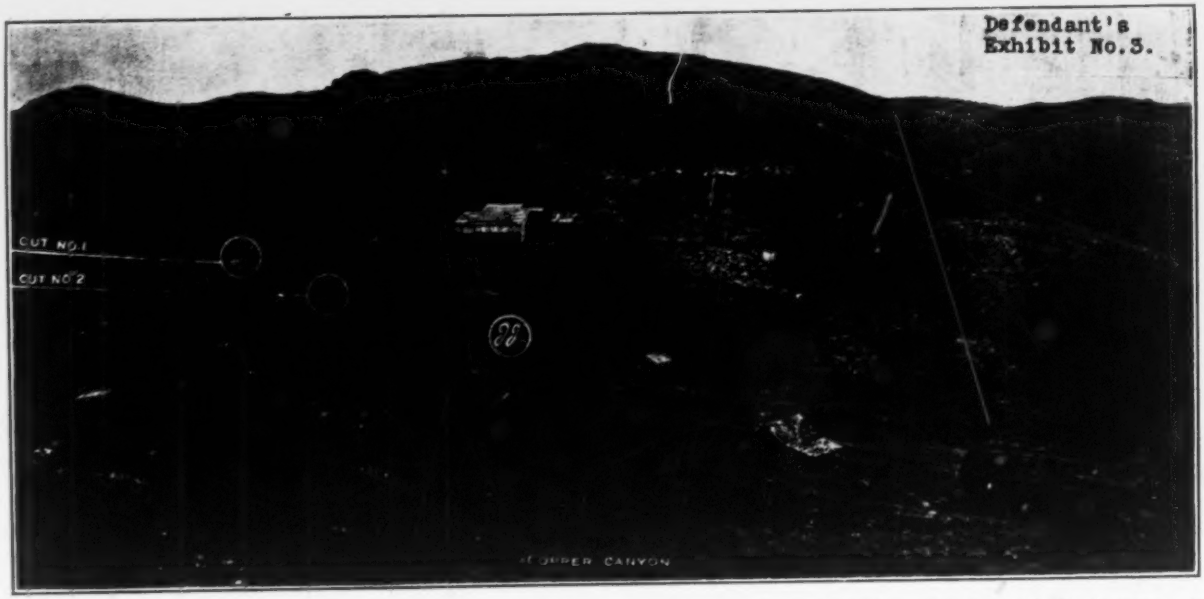
SECTION 456. Being thus insufficient, we might leave the subject entirely, but as this court cannot be as familiar with this record as we, we will sift it down and determine if there is any grain of value about this subject to enlighten the court, or bear on the validity of the Salt Lake No. 3 as a lode location.

SECTION 457. *The Discovery Point.* The exact point of the original discovery of mineral on the Salt Lake No. 3 on February 2, 1897, cannot now be determined. The only approximate guide or indicacia of its original position on the claim is that afforded by the recorded location notice, and by the testimony of John Jory and Joseph Jory, who were employed at the time

by J. H. Clive to perform the manual labor of monumenting and staking the boundaries, and recording it.

SECTION 458. The location notice recites that the discovery point on the claim is 255 feet from the north end line and 1245 feet from the south end line of the claim, and 300 feet from each side. (Record p. 302.) This point on being surveyed out by a surveyor with reference to the boundary stakes and corners, since this suit came up, is computed to be at some point on *the wash* or floor of the canyon. As the court will see by the line of the wagon road on the map, Sec. 8 ante (which follows the canyon), the canyon enters the Salt Lake No. 3 at the north end line, and passes out the west side line of the claim. But the discovery point as so computed is not in the center of the canyon, nor over the channel or line of greatest depth of wash, dirt and gravel, but to one side and nearer to or on the slopes, as presently seen, and where the depth of the surface soil, dirt or gravel is negligible.

SECTION 459. But it is not at all probable, certainly not otherwise proved, that the precise mathematical point of discovery as computed and surveyed out from the corner monuments, is at the point of original discovery of mineral on the ground. The Jorys testify that it is not, and they are the only witnesses at the trial who knew or had seen the original point of discovery of mineral in 1897 on the Salt Lake 3. We must infer from their testimony that the discovery point was on rising ground. Thus, *John Jory*:



Copper Canyon at north part of Salt Lake No. 3. Showing mill, mill-road, cuts 1 and 2, houses, and old cabin known as Emanuel Pierce cabin, indicated by J. J. on roof.

Rec. Page

295 Found mineral-bearing lode, yes, it was sticking out of ground, there had been some work done there in early days and they had throwed out a little **dump** there, **uncovering this lode.** Judge the vein about 18 inches wide.

312-3 The dump was just **below the outcrop.**

(See Jos. Jory, Rec. 327-8, 337.)

Now, the dump, or pile of excavated material, could not be *below the outcrop* or *vein* exposed by the removal of the said material or surface covering, unless the surface is sloping at that point, so as to permit the dump to form at a lower elevation than the outcrop or vein thus exposed. If it were level ground, the dump would not be below but above the outcrop thus exposed.

SECTION 460. The same result follows from their further testimony that the point of mineral discovery on the Salt Lake No. 3 was at a point about 200 or 250 feet north of the Emanuel Pierce cabin (Record pp. 594-608), which Joseph Jory says is situate on rising ground from the floor or bed of the canyon (Record p. 609). The Pierce cabin is shown on one of the photographic exhibits reproduced on the opposite page, indicated by "J. J." (John Jory's initials, Record p. 594), written on the roof in the picture. The cabin is on a line with the mill (across), and almost on the verge of the rise or slope of the hillside. The photo is taken from a position looking up the canyon or northerly (Record p. 595). As the court will see by the map, Sec. 8 ante, taken from their Exhibit A, the lay of the canyon is a

little west of north, so that north from the Emanuel Pierce cabin would verge easterly from the floor of the canyon somewhat and throw the discovery point of the Salt Lake No. 3 on to the sloping ground of the east side of the canyon, as seen in the picture, and into the region of the general fissuring and fracturing exposed by the later workings at Cuts Nos. 1 and 2 and along the roadway to the mill shown in picture. Not that the veins, fissures, etc., are confined to those exposures, but they extend most everywhere under the surface covering of dirt, which is a few inches deep on that hillside. But the point is that the original discovery point of Salt Lake No. 3 was not down on the wash or bed of the canyon, either in the center or at the sides of the wash, but a little off the floor of the canyon, in order to be on sloping ground and where the depth of dirt to bed rock is at most only a few inches or a foot, and it is immaterial how far on the surface it is to the first protruding outcrop of hard rock or rock in place.

SECTION 461. The Jorys did not survey the ground at the time, but merely paced it off and put up their stakes at corners and side centers (Record pp. 603-4), going "one pace and call it three"; (Record p. 609). The ground on Salt Lake No. 3 is mostly sloping hillsides and uneven, and it is not possible to be as accurate in pacing or stepping off the distances from the discovery point to the ends and side lines as if they had used an instrument. They were as accurate as the law requires a miner or locator to be in measuring off and posting their stakes and monuments, and inserting their distances in

the location notice. They inserted a duplicate of their location notice in a small tin can and put it in among the rocks of the location monument. (Record pp. 604-5.)

SECTION 462. The statutes in Nevada at that time (February 2, 1897) did not require any discovery work of any amount, size, or depth in order to make a mining location, but only a discovery of a lode, ledge or vein in place, in keeping with the federal statute (U. S. Rev. St., Sec. 2320). The Jorys, however, as stated, were not the locators themselves but only the employees doing the manual labor for J. H. Clive the locator, who picked out the ground and instructed them to locate it for him. (Record pp. 585-6, 590. 598, 603, 606, 614.) At the discovery point they found a small surface opening, as said before, with a ledge or vein showing sticking up out of the ground in the cut or opening. Part of the vein had been taken away, or "worked on" by some one. (Record p. 563.) This small opening was made by some one in the ground before the Jorys went there to do their work. (Record p. 626.) They located this and a number of adjoining claims for Mr. Clive, on the same day. Whether the surface openings were made by Mr. Clive or some one for him or by some one else is not stated.

SECTION 463. After doing this work the Jorys were paid for their work and went away to their ranch, some miles distant at Willow Creek (Record p. 610), and while they were back through the canyon occasionally afterwards (Record p. 610), they had no occasion to visit or notice the discovery point on Salt Lake No. 3 for many years thereafter, and until after this con-

troversy arose (Record p. 574). In the fall of 1913 or 1914, after this controversy arose, they were sent for by Plaintiff in error, and John Jory came to look for and point out his discovery point on the Salt Lake No. 3. He went to the ground for the purpose, but at a time when defendant in error Guy Davis was parading around, claiming to be owner of the ground under the newly made Guy Davis relocation, and while the injunctions were being applied for against him and the other jumpers. Guy Davis ordered him off the ground and would not let him look. (Record pp. 587, 575, 592.) Whether the location monument of the Salt Lake No. 3 might then have been found in its original position on the ground, and so have pointed out the discovery point, does not appear in evidence; but when Mr. Jory did get over there again the next year and after the injunctions were granted, he was unable to find either the location monument or discovery point where he originally saw the lode or ledge in the shallow surface opening on the ground, or the dump on which he posted the monument and his location notice. (Record pp. 587, 594-5, 607, 619.)

SECTION 464. Jory did find his can and notice, however, which he or his brother Joseph originally stuck in among the rocks of the location monument. (Record pp. 634, 606, 612.) But it was not found in any monument, but in among the material of a newly made "dump" on the side-hill at the opening of "Cut No. 2," shown on the photograph, Sec. 428 ante. (Record pp. 1007-8.) There is some question as to whether there had been a small, shallow surface cut or excavation at

that point observed in 1912, but if so it was quite diminutive; but was enlarged and increased to some 8 or 10 feet deep in the spring of 1914, for assessment work on the claim. (Record pp. 1005-6.) The Jorys say that is not where they put the monument, can, and notice, in February, 1897 (Record p. 587), and except for indicating the approximate position where it should be, as hereinbefore mentioned, they were not able to identify the exact point on the ground where they had put it, and where they saw the lode or vein in the shallow surface opening at that time. (Record pp. 587, 594-5, 606-7, 610, 619.)

SECTION 465. It is very evident that the original shallow surface opening where the lode or vein appeared, and which was adopted at the discovery location point of the Salt Lake No. 3 has become filled up and obliterated in the course of the years since 1897, by the continual sediment and wash brought down by drainage from storms, rains and snows from the slopes above it, so as to be no longer visible, or traceable. There is testimony of a heavy cloud-burst about ten years ago that did much damage in the canyon, washing out the road and end of a barn. (Record, pp. 571, 583, 611.) The location monument has either been destroyed in the same way, or removed by accident or design,—possibly after Guy Davis learned by John Jory's visit to search for it that it was liable to cut some figure in the question of the proper location of the Salt Lake No. 3. But subsequent obliteration of discovery work, monuments, or boundaries, once lawfully made or estab-

lished, does not affect the validity of a claim. Cases cited in Section 347 ante.

SECTION 466. It will thus be seen that the precise position on the claim of the original discovery of mineral is involved in some uncertainty. But the precise position of the discovery is not so important as the fact of the discovery. And as all of that ground is cut up by veins and seams of mineral everywhere, the object of the statutes requiring discovery (viz: to insure that non-mineral or agricultural land shall not be taken up under mining entry) has been fulfilled, regardless of the exact point on the vein or veins where the discovery originally occurred. Cases cited, Sec. 480 post. The statute is further met by the subsequent discoveries of mineral on the roadway, in the shafts or open cuts Nos. 1 and 2, and back of the mill. See cases cited, Sec. 444 ante, also

See Sec. 444 ante.
27 CYC. 556 and copious citations;
Healey vs. Rupp, 86 Pac. 1015 and citations;
Min. Co. vs. Min. Co., 196 U. S. 342;
Jupiter M. Co. vs. Min. Co., 11 Fed. 676.

SECTION 467. *Center Line.* And so far as the testimony as to the center line, and also at the assumed or hypothetical discovery point, being wash or dirt and gravel, and so much distant from rock croppings *at the surface* of the ground, as in Secs. 496-497 post, it is of no moment whatever in this case, whether there was any "hard rock" or rock formation protruding from the surface of the ground at any of those points or not.

Nor is it important how far it is to hard rock protruding *at the surface*. Such an inquiry is wholly childish. If they had removed the surface dirt at any of those points and told us whether it was two inches, or six inches, or three feet down to the solid rock formation which is part of the mass of the mountain, and in which the lodes and veins exist here, there and everywhere, it might have some interest for us in this case. As shown by the map of the claims, the center line of Salt Lake No. 3 is not on or about the floor of the canyon more than one-third of its length, at most, and even for that distance not over the channel or line of union of the slopes at the bottom, where there is greatest depth of wash or gravel. And either along the center line or elsewhere on the ground they did not do any shovelling, scraping, or other *real work* in their prognosis of this ground. They were content with mental calculation and wasted neither time nor perspiration in getting facts for the jury.

SECTION 468. By referring to the photographs opposite the latter part of Section 469 post, which are replicas of the exhibits in evidence, showing the hillsides and general topography, the court will see there is hardly a point on the hills anywhere, that there is not a little surface soil, as denoted by little bunchy sagebrush all over. Even at the mill-road, and at cuts 1 and 2, where the testimony is that the surface soil and wash is only 3 or 4 inches deep, there is sage brush growing. Yet the road-way had to be blasted out of solid rock for over 300 feet, to make a way level enough to drive a wagon over. And with equal reason they

could have testified long distances on the surface *about those points* where no hard rock was exposed before those openings or road-way were made. But it is only such dirt and slide as collects upon any slanting hill-side or slope of country rock, and where the depth to bed-rock at any point must be insignificant.

SECTION 469. During their great efforts to keep out the testimony as to lodes and veins on this ground, it often became a question of an inch or two of surface soil, dirt or covering, whether a given lode or vein was or was not exposed at the surface at a given period of time. The following extracts and references to the testimony will illustrate this point, in connection with the topography of the ground, and depth of the wash at given points on the ground.

1. *Topography.* The hills comprising these claims are typical Nevada hills, yes. Identifies Defendant's photographs Exhibits Nos. 1, 2 and 3 as correct of Copper canyon and vicinity at Salt Lake No. 3 lode claim. Exhibits introduced in evidence.

Moran, pp. 388-9-390.

Lowest point in gulch about 100 feet east of wagon road at one point; then it begins to rise. At some points the ground is lower east of the wagon road than at wagon road.

Moran, p. 387.

(This fact appears by the photographs as to comparative elevation of wagon road at some points, but in the main the road follows the bottom of the

canyon. See Exhibits 1, 2, and 3, and the hills rise on each side of the road and canyon).

At the discovery point on Salt Lake No. 3, the lowest point is about 75 feet east of discovery; gulch continues about 75 feet east, then begins to rise. General slope westerly, rises to the west.

Record pp. 359-60, 1150.

See also photographs of ground showing hills and contour of ground, in photographic exhibits for Defendant Nos. 9, 12, 13, 28.

Record pp. 595-6, 687-8-9, 961-2.

See testimony at page 233 sec. 221 ante.

2. *Formation.* I took the prevailing formation on these claims to be quartzite; the quartzite beds dip westerly in that section. The fact that the formation is quartzite in my opinion has nothing to do with the value of the claims. The quartzite of both those ranges (Battle Mtn. and Shoshone), if quartzite as I believe, contain valuable mineral deposits.

Boyle, record pp. 421, 427-8.

As to the cause of those beds dipping west, there may have been an igneous intrusion. In view of their dipping west it would be probable, but not necessary, that there was an igneous intrusion. It might have been due to the thrusting up of the formation by the intrusion of molten matter under the formation, or in between the bedding planes of that and other formations underlying it. Or it may have been due to faulting or crumpling. I am not

475

prepared to say that there was not a molten intrusion in the east which threw the quartzite beds to the west, and forced them to dip to the west in that manner. Am not prepared to account for the dynamic geology of that canyon.

Record pp. 428-9.

(There were sufficient exposures thus for the witness to classify the character of the country rock on these claims (Record p. 428), and for witness Tibby to do so (Record pp. 932-35); Liddell at p. 754 and in fact for all the witnesses to do so.

3. *Depth of Wash or Surface Loose Material.* The actual formation and rock in place can be seen at many places on the ridge coming down into Copper Canyon where the cropping can be seen. (See photographs post.)

Liddell, pp. 753-4.

(Same witness speaks of two ridges coming down into gulch from the hill sides, at record pp. 834-835). In wagon road from office to boarding house you go up a distinct little rise and on that rise I am pretty certain there is rock cropping. Its course, easterly and westerly.

Then going southerly the line goes over a ridge, where I could not state I actually found rock croppings, but the contour of the hill would lead me to believe the whole formation actually in place. That is, you may not actually see the cropping of rock, but if you would scrape away the surface

dirt, you would be right on the formation which composes the hill. You would get on bedrock though not exposed at the surface at all points.

Liddell, 835.

There is a ridge coming down at the south end of the claim covered at points with brush and soil, and at other points the formation is disclosed. Liddell 854-5. You cannot see that on Exhibit 3 (p. 855-6).

Marks point on Defendant's Exhibit No. 2 where rock crops, with line to margin.

Liddell p. 882.

All of that hill will have here and there a wash and the formation will be jutting out here and there. It is not all submerged.

Ralph, p. 1047 and see Photo Exhibits.

The road to the mill exposes veins and seams, though not run for that purpose. The road cross-cuts the country formation and is about 350 feet in length in solid rock the whole extent. And in cross-cutting the formation every vein that apexes within that 300 or 350 feet is exposed there. This ledge went along parallel with the road a little distance, so that the shaft in going down practically took out that section, and then it came across the road and went into that bank.

Before the road was built a hen couldn't go there and scratch a hole deep enough to make a

nest along that road. Every foot of that road is in blasting rock.

On the outer rim of the road there is still wash and debris.

Ralph, 975, 976, 1033-4.

When we located the Evening Star, we found a little hole not over 4 feet long, 2 or 3 feet wide, 1 foot deep, with vein in it and we did the discovery work there and made it 6 feet wide, 10 feet long, 10 feet deep.

Jurey, record pp. 631-2-3-4.

When we located the Midas, we found a little hole showing the vein and walls, and we did the discovery work there and made it 6 feet wide, 10 feet long, 10 feet deep.

Jurey, record pp. 637-8-9.

Both Liddell and Tibby sampled the material in this cut which was in hard rock. (See Sec. 345 post.)

Tibby also took samples from same vein material at points which are 10, 50 and 130 feet from the open cut, visible at the surface, yielding mineralized assays. Country rock samples exposed in vicinity of that shaft, of which Ralph says anyone can take as many tons as he pleases. (Sec. 345 post.)

Tunnel at point "22" on map, runs in about 50 feet in hard rock and a vein visible in the roof of the tunnel. (Liddell.)

Tibby says this vein is visible in the roof of the tunnel only 7 feet from the portal. The vein also sampled as far as 37 feet in from portal or mouth of tunnel. (See Sec. 347 post.)

Open Cut 20, size 4½ feet wide, 20 to 30 feet long, 10 feet face in hard rock, in September, 1913. (Sec. 115-117, 191.)

Liddell took sample from 10 inches of quartz in the roof of a cross-cut driven from the bottom of a small shaft sunk in the floor of the open cut. Liddell gives size 5x7x23 feet long, and says that vein must have been exposed before the shaft was sunk by the work done originally on the open cut, because the shaft could not have been dug at all without exposing it. The vein came up to the floor of the cut where the shaft was sunk, and up to the ridge of the surface. The whole cut was in silicified material, and you can see a vein now in what have been a portion of the cut before September, 1913.

Tibby testifies to same facts as Liddell about this cut, showing rock cropping at the surface, also vein, shaft and cross-cut, at this point.

Tibby tells of rock croppings at record p. 889-90 and Ralph at record p. 1009.

Liddell tells of an open cut 10 or 12 ft. long and only 1½ or 2 feet deep exposing hard rock, and a mineral vein immediately under the dirt or soil caved into it from the sides, ascertained upon his

two visits to the spot, on the side hill near mill on the Salt Lake No. 3. Samples mineralized.

Record pp. 759-60.

Another point (Cut No. 2) near the mill, the vein material from which he took the sample, extend to the surface before September, 1913.

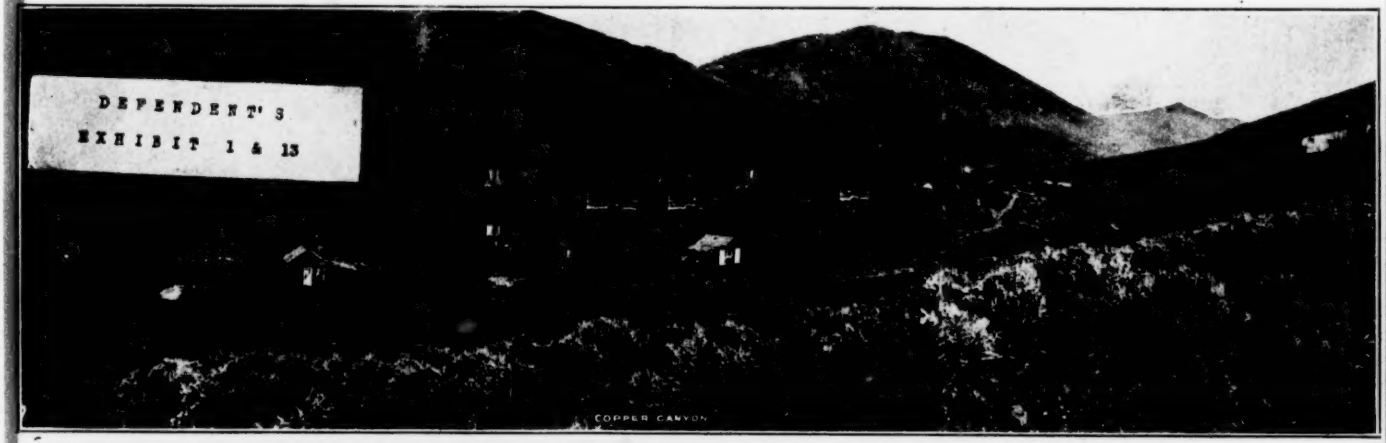
Record pp. 819-24.

Ralph testifies to same cut or opening, and the vein therein which reaches up to the 3 or 4 inches of surface soil on top.

(See testimony cited in Sec. 506 post.)

Record pp. 785-6, 971-3 and Tibby, pp. 893 and 895.

I took samples from that cut "2" and samples of rock for 15 or 20 feet around there; stood in the cut and took it from even with my shoulders; whether that was exposed in September, 1913, the chances are I could have gone there and by scratching off the surface dirt, have taken it. In September, 1913 there were only croppings there, no cut, and now there is a cut 4 or 5 feet wide, 12-ft. face, 15 feet long, and a 4-ft. vein.



Showing Topography, contour of ground, and evident depth of soil or wash at points in Canyon on Salt Lake No. 3 near the mill and houses. *Looking north.*

Showing topography, contour of bed rock, and evident depth of soil at different points, about the buildings on Salt Lake No. 3. *Looking south.*

THE COURT: How far below the surface was that taken?

A. There is an overburden or cliff on the hanging wall of the vein, about that much (indicating) I would say about a foot. There was a solid formation of the same material above it. The lode goes to the surface. The place I took the sample may have been a foot under the surface as I saw it in 1913. The old cut is obliterated and hard to say where the old cut ceased and the new cut commenced.

Ralph, record pp. 972, 973.

Enough of the vein cropped out against the big rock in 1913 to cause me to give instructions to have that cut made.

Ralph, record pp. 1055-56.

Excavations for foundations of the mill made in a set of benches on the hillside (see photos), and the lower bench exposes a vein.

Liddell, record p. 762.

Tibby speaks of the same vein of which he has a photograph, admitted in evidence as Defendant's Exhibit No. 20.

Tibby, record pp. 894-897.

Defendant's photo Exhibit No. 28 shows by x mark on original the point where vein exposed by leaching tank back of mill.

Ralph, record pp. 960-61-62.

Tibby speaks of tracing vein up to surface of cut by the road which runs up to mill from canyon below, up to edge of cut. The vein led to the surface, because there is no surface covering there. It extends up the side of the shaft to the very edge where the road would be. Vein appeared on surface of the road at the very upper edge of the road-side shaft.

Tibby, record pp. 902, 905.

Tibby's photographic Exhibits Nos. 20 and 45 showing vein exposed at and about the surface, just below the mill and in back of the leaching vats, and also the vein in Cut No. 2 on map, is reproduced on pages opposite, showing not only the vein, but the grass roots at the top of photo, betraying proximity to surface of the ground.

Record pp. 892-3, 896, 899, 1166.

Tibby indicates locality of ridges and surface rock in place at points on the ground.

Record pp. 889-90-91.
and Ralph at record pp. 1008-9.

down in canyon but at side of the channel or wash of canyon.

HEALEY (For Plaintiffs): I didn't say I couldn't find any solid rock over the claims. I said over the center line of Salt Lake No. 3 I couldn't find any.

Record p. 1130.

VAN ORMAN (For Plaintiffs): I said along

the center of the claim (Salt Lake No. 3), there is no hard rock. I mean approximately the center, referring to the main gulch. There is country rock in little spots near the center of the ground. There are outcrops at different parts of the claim.

Record pp. 237-38.

TIBBEY: A vein coming to the surface does not always show in a bold outcropping. Where the vein material is softer than the surrounding country rock, the outcrop—if we may so call it—is evidenced by a depression rather than an outcrop in the ground.

Record p. 938.

Plaintiffs' counsel admit at the trial that the cost of excavating for that part of the mill foundations situate on Salt Lake No. 3 (about half) was *at least one thousand dollars,* and of the road to mill *at least five hundred dollars,* on Salt Lake No. 3.

Record p. 662.

SECTION 470. The only cuts, shafts or openings testified to having any depth through the wash to bed rock, are those situate in the bottom of the canyon, where the dirt and gravel have accumulated, just as the placer gold has done, by erosion and washing down from the hill-sides above for generations and ages past. These are referred to on our map Sec. 8 herein as follows:

No. 29 a 50-ft. well.
Record p. 221.
Cut No. 28, 4x7x5 ft.
Record pp. 353-4.

Cuts in wash, evidently No. 11 and 12 by position (Record pp. 232-234), which Jurey says were 12 to 15 ft. deep.

Record pp. 648-649.

Cuts Nos. 6, 9 and another unidentified number made by Sheeby Williams et al, in channel of canyon, depth 50 to 57 feet.

Record pp. 246-249.

Cut near common corner of the three lode claims, size 3½x6x7 feet in the "wash" of canyon.

Record pp. 276-7.

Shaft No. 19 in channel of canyon, discovery work for the alleged Homestake claim, about 40 feet.

Record pp. 273-4-5.

Testified average depth of wash in channel of canyon judging from shafts sunk therein, is about 40 to 45 feet.

Record p. 277.

Shaft in wash of canyon at No. 25 near exit of canyon from Evening Star claim, sunk by Phillips, 35 feet deep.

Record pp. 317-18.

Shaft No. 26 on map, sunk by Joseph Ralph before the placer locations original placer discovery in canyon, sunk vertically 22 or 23 feet, thence off on incline easterly with sloping bed rock under wash to channel of canyon; total depth about 53 or 55 feet or over.

Record pp. 298, 299, 322-323, 300.
(See illustrative drawing at Sec. 474 post.

The foregoing are all the openings in the bottom of the canyon we find the depths given.

SECTION 471. The following workings on the side hills off the wash or floor of the canyon, have the depths or dimensions given, and show no substantial depths of the surface covering of soil or loose material, not in place.

Cuts Nos. 1, 2, 3 and 4 are open cuts with no depth at the entrance, and a face at the other end according to the slope of the hill. We find no mention of the height of the face of these cuts, except of No. 3 below.

Nos 1 and 2 are in hard rock with vein showings, of which the photo Exhibit No. 45 (Sec. 428 ante) shows the massive formation with vein and walls visible, right at the surface of the ground, as you walk in on the floor of the open cut. See also the photo Exhibit No. 20 (Sec. 429 ante), showing the excavation at the leaching tank just below or behind the mill. If a worm can find dirt enough to crawl under, it would be a stout worm, at those points, except up at the top of photo where the grass roots appear.

No. 3 an open cut, 3-ft. face, in back of building K, (Record p. 293).

No. 4 open cut, 2½ or 3 ft.
Record p. 334.

From these cuts, Nos. 1, 2 and 3 on the east side of the canyon and No. 4 on the west side the court can see that the topography of bed rock converges to the center of the canyon with little or no depth of the surface wash till the bottom of the canyon is reached.
(See illustration post.)

Open cut No. 17, 4½x10x14 to 17 ft. long.
Record pp. 281, 327-8.

Shaft No. 21, 5x6, 10 or 12 ft. deep in solid rock in place.
Record pp. 281-2, 327-8.

Tunnel No. 22 now 75 ft. in length in solid rock in place.
Record pp. 326-7, 344, 355-6, 375.

Open cut No. 23, 15 to 20 ft. long, width and face not given.
Record pp. 328-9.

Open cut No. 20, 4½ ft. wide, 8 or 9-ft. face, 20 or 30 ft. long, in solid rock in place.
Record pp. 278, 711-12.

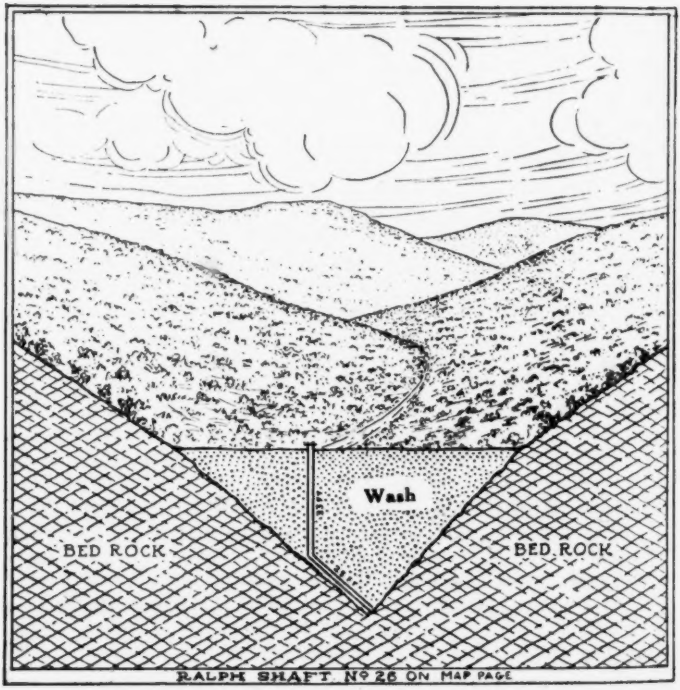
Open cut No. 24, 4½ ft. wide, 25 ft. long, 7-ft. face; in hard rock in place.
Record pp. 279, 321-22.

(See page 233 Rec. 231 ante)

SECTION 472. A study of the preceding three sections will show that the depth of the "wash" or surface soil and gravel is negligible at all points on the side hills and elsewhere on these lode claims, save in the bottom of the canyon itself, and perhaps at some points in the draws or arroyas coming down from the slopes into the canyon, where surface irregularities of bed rock may have permitted some accumulation of soil, but to no considerable depth. To excavate enough material on the side hill to make a level place for the mill foundation, cost in 1912 more than $1,000; and enough excavation for about 300 feet of road cost at least $500, and much more, but they were willing to admit at least that much, which sufficed for assessment work for 1912. Such blasting and cost is not indicative of much depth of soil and loose material.

SECTION 473. In the case of the Midas tunnel (Point 22) where there is a vein showing in the roof of the tunnel only seven feet in from the portal; and in the short drift from the shaft at Point 20, a vein showing in the roof of that a few feet from the surface, where does the vein extend to upwardly from where they are exposed and visible from the workings which intersect them beneath? If they extend anywhere they are bound to extend up to the soil and grass roots which is necessarily shallow at those points, like those veins showing in the photographs herewith, where the grass roots show at the top right in contact with the vein matter between the walls of country rock. (Sec. 429 ante.)

SECTION 474. And at the shaft "26" near the exit of the canyon from west line of the Evening Star, which is a point not right over the center of the channel of the canyon at that point, but a few feet west of the center, the shaft intended by Mr. Ralph in the summer of 1913 to reach the placer deposits of the canyon, going down vertically 33 feet, struck the sloping bed rock which forms the western slope of the canyon, and was obliged to go off from vertical with the slope 25 feet east to reach the bottom or pay streak at the channel.



(Illustrating Shaft No. 26 cited to the record on page ante.)

SECTION 475. For that matter, it should need no demonstration to show that these things are necessarily so. Water drains from higher to lower elevations and collects at the bottom, and so does sediment which accompanies the drainage, and precipitates or settles in the lowest points, and wherever there is a vessel or container, or partial cavity in bed rock, to receive it. This sediment has a tendency to distribute itself evenly, and thus constructs the floor of the canyon, or surface of the wash laid down therein. On the slopes above, naturally there will be a shallow veneer or layer of loose dirt and soil or gravel at most points, except where the surface of bed rock is precipitous or abrupt, in which case the rock will outcrop or project from the dirt covering. Science shows us that the loose soil is merely the decomposed and disintegrated formation which remains hard rock at points not exposed to the disintegrating causes, the more noted of which is the weathering and attrition constantly going on at the surface, the heat, cold, softening, pulverizing processes, which is constantly manufacturing new sediment and carrying it down the slopes. If one empties a bucket of muddy water, heavyily laden with dirt and soil in solution, over a rough sloping surfaoe, a little of the sediment will remain on the slope, but the most of it will collect at the first point on the bottom where it can be still long enough to settle.

SECTION 476. In the canyon channel, which is roughly like a V, or two boards nailed together, the depth of the soil and gravel is naturally greater in the

center than it is on either side near the edge of the wash or detritus. Beyond the canyon floor and on the slopes, there is only such depth as some surface cavity or irregularity, or the degree of the slope may permit, combined with the amount and swiftness of the surface drainage at that point, and the drainage area above it. This court scarcely needs a witness to come and tell it such manifest truths about the operations of natural laws. We might as well be obliged to explain to the court that when the moon is full, and there are no clouds, a bright silvery light covers the landscape wherever there is no mountain, house or other opaque object to deflect it.

SECTION 477. We have gone to this trouble in record citations however, in order that the folly may more readily appear, of presenting testimony or evidence as to the distance on the surface from any object to the nearest rock cropping or "hard rock" to which Plaintiffs' counsel and witnesses were prone. Fifty, 75 or 150 feet from this or the other object to the nearest hard rock on the surface signifies nothing, when it may be only 3 inches vertically and can not be more than a few feet at any point *under the surface* to the hard rock or bed rock in question.

SECTION 478. But a location monument like the notice itself is designed merely to inform the public of the location of the ground. And where notice is in fact afforded by a defendant's atcual possession of the ground in person, or by his agents, improvements, and excavations on the ground, and mineral exposed at some

points, or by any other means however acquired, such notice is sufficient no matter if there be no location monument at all, or if there be one improperly placed, or away from any mineral exposure on the ground. By any such means , subsequent locators are sufficiently warned, and cannot complain of alleged defects in notice.

SECTION 479.

"If Foster had actual notice of the location and boundaries of said claim, he nor his grantees will be permitted to take advantage of a technical defect in the location notice, where it appears that said claims were located in good faith."

Bismarck Mtn. Co. vs. Min. Co., 95 Pac. 14.

"The mining laws of the United States do not require any notice to be posted, and in the absence of any legal rule, or law requiring it, the location is valid, the boundaries of which are properly marked upon the ground."

Book vs. Jutice Mining Co., 58 Fed. 107.

"Where the local rules or laws require posting of notices at the time of location, the construction to be given such notices is to be liberal, not technical."

Id. 58 Fed. 108.

"Positive exactness as to course is not required. The stakes and monuments on the ground control."

Id. 58 Fed. 107.

"Filing a defective certificate or notice, or the

failure to file any, for a mining claim, does not invalidate the claim.

Gibson vs. Hjul, 32 Nev. 360 (108 Pac. 759-61).

Want or defect of location notice immaterial if relocator had actual notice of the prior location on the ground.

Min. Co. vs. Murphy, 109 Pac. 852-855-6.

(O.) PURPOSE OF REQUIREMENT OF MINERAL DISCOVERY IN A MINING CLAIM.

SECTION 480. It has been held that the purpose of the requirement of a mineral discovery in a mining claim, under U. S. Rev. Stat. Sec. 2319 and 2320 was to prevent fraud upon the Government by persons attempting to acquire title to lands not mineral in character under the laws for disposal of metaliferous lands.

Lange vs. Robinson, 148 Fed. 799;
Sanders vs. Noble, 55 Pac. 1037;
7 L. R. A. (NS) 819, note;
Mining Co. vs. Rutter, 87 Fed. 801.

And we might multiply citations to the same point, were it needful.

SECTION 481. In view of this principle, there can be no doubt that the purpose of the statute has been amply met, by the proven existence of lodes and veins throughout this ground, as shown by citations to the

record, in Sections 115-119, 171-173, 221, 275, 381, 408-9, 327-330, 436, 459-461, of this brief. The contentions of a mere jumper who desires to take over to himself the benefit of the labor, expenditures and investment of the owner of the lode claims and his grantors for these many years, nearly a generation in case of one of the claims, should receive little consideration. And it has been adjudged they are entitled to little.

Davis vs. Smith, 85 Pac. 1079; 104 Pac. 130;
Davis vs. Weibold, 139 U. S. 507-525;
Min. Co. vs. Day, 85 Pac. 113-114;
Cheeseman vs. Hart, 42 Fed. 98;
Bevis vs. Markland, 130 Fed. 226.

(P.) MINING OPERATIONS.

SECTION 482. Some questions were asked by Plaintiffs' counsel whether there had been any mining operations, and to what extent, carried on recently on these lode claims. This had no relation to any issue in the pleadings, or any principle of decision in these cases. As shown in Sec. 594 hereof, the doing of the original discovery work is in itself a partial exploitation, and the performance of all annual labor required by law completes the mining operations required by law. (Sec. 484.) The implication from the questions is that it is necessary to work getting out ore every day from a mining claim, to preserve its validity. And that if there are twenty mining claims, ore must be

taken out of each claim every day, in order to preserve them all. That is not the law.

SECTION 483. Mr. Ralph at record page 1056-7 testified what the conditions were when he reached the property in the fall of 1912, representing the then owners. There had been a financial smash, and work had been suspended with the men unpaid, to make necessary financial adjustments. The courts take notice of the necessities and exigencies of the ordinary business of mining, and no continuous stretch of performance in this respect is required outside of the annual labor.

> "The exigencies of the mining business frequently require property of this kind to remain idle for a time, but that is not necessarily evidence of an intent to abandon it. In this case at least the acts of the Plaintiffs show that such was not their intention."
>
> Lockhart vs. Rollins, 21 Pac. 415.

SECTION 484. This language may be easily paraphrased into the cases at bar as descriptive of the conditions. After the smash and suspension of business and prior to the conflicting locations in September, 1913, the owner of these three lode claims caused to be done thereon over 80 feet of shafting, in addition to the required annual labor. (*Record pp.* 1057-8), and such other work as testified.

> Labor is not required to be expended in any particular manner on a mining claim.

Lockhart vs. Rollins, 21 Pac. 415;

Citing:

McGarrity vs. Byington, 12 Calif. 426.

Work done for discovering mineral, whatever the form of the deposit, whether lode or placer, is work and improvement within the meaning of the statute.

Walton vs. Mining Co., 123 Fed. 209, 217-8.

After location, and discovery, the performance of the required annual labor dispenses with necessity for any further work or act of possession of the claim.

Borgwardt vs. Oil Co., 130 Pac. 417.

The Court below instructed the jury there was no question as to the performance of the annual labor, and no claim as to forfeiture.

Record p. 1225.

SECTION 485. *Extraction of Ore.*

The validity of a mining claim does not depend upon the extraction of ore therefrom.

Kirk vs. Meldrum, 28 Colo. 454, 65 Pac. 633;

Min. Co. vs. Min. Co., 143 U. S. 396;

Secs. 594-595 post.

A tunnel worked from time to time by different parties held good in support of adverse possession.

Harris vs Min Co. 8 Fed 863.

(Q.) GENERAL IRRELEVANCY, INCOMPETENCY AND INSUFFICIENCY OF THEIR TESTIMONY AS TO RECENT INSPECTION OF GROUND, ETC.

SECTION 486. *Conclusion.* In view of our record titles, long possession and working, and annual labor maintained, which are undisputed in the record, it appears to us that the manner of their secret entry and setting up an inquiry about lodes or veins, such as they pretend, is a little short of audacious. It was a trespass forbidden by law, in the first place, and in defiance of court injunctions, to which they testified. If they had imagined a *right* to enter and make such inquiry, and desired to proceed equitably, they would have given the owner or his agents notice of their intentions, with opportunity to point out to them the lodes and veins on the ground. It is but elementary justice that one who has property, is in possession of it, and claims the right to it, should have a look-in upon any proceedings designed to deprive him of it. He has a right to know that the investigators will be fair with him, and willing to do him justice, and the methods to be followed in getting and weighing the evidence against him; or a chance to revise their proceedings in a proper forum. They ought to be unbiased investigators, having no financial interest to warp or bias their judgment as such. Especially so, where the fact relates to the physical condition of ground or property, and of the metallic and chemical elements in rock; the geological properties of the vein or fissure filling. Something which

cannot always be discerned at a glance with the naked eye. And where a just conclusion may depend upon a careful and diligent searching for mineral, with a bona fide desire to find it, under conditions and in localities most likely to result in finding it, with no adverse financial interest to prevent their finding it.

Under the cases to be cited, it will not be competent legal evidence sufficient on which to base a verdict or judgment, for two or three parties who have made up their minds to take property from the possession of its owner and claimant, and who enter upon the ground for the purpose of carrying out such enterprise, without the knowledge or consent of the owner and possessor—to set up an inquiry and have their findings accepted as evidence in court. With a knowledge that over $100,000 is about to fall into their pockets if they be successful in seeing no lodes or veins on the ground, and in order that the $100,000 might the more surely fall into their pockets, they made their secret and unlawful entry and "walked over the ground" in order to prepare themselves to so testify, that they would become at least $100,000 richer than they were before. With the knowledge that if they saw and testified to any veins they would not get the $100,000. To say that such a witness would make any diligent effort to see a lode or vein, or would enable himself to testify that he had seen a vein or lode—would be to convict him of "walking backwards," and of doing something to the destruction of his enterprise itself—to the undoing of his own business. If we concede that he would testify truthfully that he saw no veins, we could not

credit him with making diligent efforts to see a thing that would mean ruination for him and spell either defeat or perjury for him in the law suit. It is no wonder he would call the fissures "breaks," "slips," "fracture zones," and anything else on earth besides "veins or lodes"; and that he would not call anything a vein or lode unless it contained commercial values in the particular sample which he happened to take in the neighborhood of the open cut in which such vein or lode occurred.

SECTION 487. This character of testimony, viz.: of witnesses sent specially to rumage about upon ground within a mining location with a view to preparing them as witnesses to testify adversely to its validity as a mining location, based upon what they might see or fail to see on the ground, without regard to or knowledge of the original physical facts of discovery, has been denounced as pernicious and misleading or tending to deceive in several of our courts, especially in trials before a jury.

SECTION 488. Thus in Clark Montana Realty Co. vs. Ferguson, 218 Fed. 959, which was one of the class of cases cited in which a junior lode locator sought to hold from the prior placer patentee certain lodes or veins which he contended were "known veins" within the meaning of the statute (U. S. Rev. St. Secs. 2329-2333, placer locations). As such junior the usual burden was upon him in attacking a senior location. This burden, and his interest and efforts were, to prove the prior existence of the lodes, and the placer locator's knowledge of them at the time he applied for his patent.

For this purpose he sent witnesses to the ground to inspect, and prepare to testify.

Concerning this evidence, the court held:

> "To revert to the evidence herein, all of the subsequent developments, disclosures, results and conditions not consequent is inadmissible and not considered. It will not do to contend that what is upon the premises now is some evidence of what was upon them then, for that is not the issue; it being what was known to be upon the premises then.
>
> "There are circumstances, not here involved, in view of which such evidence would be competent for limited purposes. For instance, if a known lode was made to appear, to determine its course and distance, or if the placer patentee asserted no lode existed even at the time of trial, to rebut the assertion, or the like.
>
> "Subsequent events conditionally admitted in a trial to the court are harmless, but in a trial to a jury would *tend to obscure the real issue, to deceive, to injustice.*"
>
> Clark Montana Realty Company vs. Ferguson, 218 Fed. 959.
>
> "Nor do I think ever after 'cooling time' that the language used respecting witnesses sent to these old openings, with their accumulated debris, to obtain evidence by inspection that no vein was, in fact, found by the original locators, and also what

was later said respecting witnesses in general, was any too strong."

Cheeseman vs. Hart, 42 Fed. 98.

SECTION 489. If this were permitted, it would be a bait to intolerable blackmail by the covetous and adventurous. All they would have to do would be to go on a mining claim secretly, and profess to determine values and characteristics adverse to its standing as a location, and then try to jump the claim. It would in all cases be successful, at any rate before many juries with their prejudice against corporations and capital. A thriving business would follow in ousting owners from their property, or collecting the price of forbearance.

If this seems improbable, the answer is that distinguished courts have reached the same conclusion, and refused to hold out this bait to the unscrupulous.

Davis vs. Weibold, 139 U. S. 507-525;
35 L. Ed. 238.

A close parallel could be drawn at bar with the Davis case. Between a subsequent discovery, and a subsequent failure to discover, as a means of ousting the previous entryman and occupant, who has expended his money in purchasing and improving property, there is no difference in principle, or in disastrous and unjust effects.

SECTION 490. The only case our opponents have cited to support this class of testimony, is the Corcoran case in 15 Nevada. That was not a mining adverse case at all, nor one involving the presumptions or burden of

proof against the junior locator, nor was the senior protected as here by adverse possession and working under U. S. Rev. St. Sec. 2332. It was a condemnation case under the power of eminent domain. Ordinarily the validity or invalidity of the location or title of the Defendant is not in issue in a condemnation suit, but title is conceded as a basis for condemnation and damages. The question in such cases is merely as to the necessity for the taking and the amount of compensation. If Defendant be not the owner, the Plaintiff condemning should change his Defendant to the real owner, and the question of prior mineral discovery as an element in the soundness of Defendant's title would not be in issue. Under peculiar conditions they did introduce and consider evidence recited to be of this classification we are objecting to. Whether the precise testimony given in that case was obnoxious to all the objections made to testimoney herein, and which other courts have found to be just objections, is not shown by the report of the case, nor need we further inquire. It does not follow of course that all testimony within a general classification that may thereafter be offered in the trial of all mining suits shall thereafter be competent in law, because the court allowed certain testimony to stand in that case, said to be within the general classification. There may be essential distinctions were the individual exact testimony seen and compared.

SECTION 491. But the Corcoran case itself is reconcilable with the cases cited by us in Sec. 488 ante, for the Corcoran case was tried to the court without a jury, and the individual trial judge in that case was

said by the reviewing to have had long experience in the trial of such cases, and to be qualified to accurately weigh such class of testimony so as to allow it no undue influence, especially as the record shows the Judge was requested to and probably did inspect the premises as an aid in applying it.

In the Clark Montana Realty case we cited supra, the court say there may be cases where in a *trial to the court* such evidence may be considered for limited purposes, and be harmless, but in trials to a jury such evidence is mischievous and tends to deceive and to injustice.

This makes the Corcoran case inappropos as a citation. The cases at bar were tried to a jury, and the mischief spoken of in our citations was inflicted, and injustice done.

(See also citations in Secs. 333, 366a-366c ante.)

SECTION 491a. For the reasons stated, the several objections to evidence offered; motion to strike out testimony and for non-suit; and exceptions to the verdicts and judgment; should have been sustained. It will not be necessary to further treat each thereof separately, save that our application for non-suit is further noticed in the next chapter (Secs. 510-520 post).

(R.) RELIEF ASKED.

SECTION 492. In consideration of the foregoing we ask the court to hold:

1. That defendants in error have no interest in or right to question the fact of prior mineral discovery in the Salt Lake No. 3 mining claim for want of interest, title, or right of action in any of them in the alleged conflicting Guy Davis location, as shown in Chapter II hereof.

2. That all inquiry by Plaintiff in error into the fact of mineral discovery as an act of original location, is barred by possession and working for the required time under U. S. Rev. Sec. 2332 and Nevada state statutes supplementary thereto, by Plaintiff in error and his grantors, as shown in Chapter III hereof.

3. That they are further barred of such inquiry by failing to allege want of mineral discovery or any other ground of invalidation of the Salt Lake No. 3, so that our locations if otherwise only prima facie are absolute as against them, under Chapter IV hereof and by the other failures of allegation and proof discussed in preceding chapters. That mineral *discovery or no* be held not in issue in these actions.

4. That nevertheless, if the inquiry be considered by this court, then that the court further hold that the evidence mentioned in assignment of error Nos. 7 to 16 inclusive, is incompetent, irrelevant and immaterial, and insufficient to support or justify the verdicts or either of them herein, except that their samples and assays showing lode mineral values is competent aaginst them, as self-disserving

testimony. Also that it was error to admit said insufficient testimony.

5. That all that class of testimony shown in Sec. 327-330 ante, is insufficient to prove that no lodes or veins exist on or in the ground in the Salt Lake No. 3 mining claim, nor even in the cuts or openings visited by them. And that their requirement of pay ore, or commercial ore, or ore in excess of $7 or $8 a ton at a specific point in an open cut or vein therein in order to enable them to classify the material as vein material, renders their testimony that they saw no veins inadmissible and insufficient on the subject of their claimed non-existence or non-finding of veins or lodes on the ground.

6. That all their testimony herein considered under Sections 385-407 and 408-448 inclusive shall be taken as affirmative testimony and proof by them of the actual existence of veins or lodes, such as will sustain valid mining locations.

7. That there is no testimony whatever to sustain a finding or verdict that no mineral discovery was made on the Salt Lake No. 3 mining claim at the time of its location in February, 1897, but the testimony and also the presumptions of law compel a contrary finding or verdict.

8. That the evidence is without conflict that lodes and veins sufficient to support a lode mining location were uncovered and exposed at sundry points on the Salt Lake No. 3 subsequent to the

original location and prior to the attempted conflicting Guy Davis location in September, 1913, so that the original mineral discovery and the points where the same occurred on the claims is immaterial.

9. That the evidence is insufficient to support or justify the special or general verdict as to no prior mineral discovery and that said verdicts and judgments are against the law for the same reason.

10. That the court below erred in refusing to strike from the record and testimony all of Plaintiffs' testimony at the trial as to the absence of lodes, or the failure or inability of their witnesses to find or discover lodes or mineral-bearing rock in place upon or within the Salt Lake No. 3 lode mining claim, as requested by Defendant below at the close of Plaintiffs' testimony in chief, and assigned herein as Error No. 27.

11. That there is no conflict in the testimony on the subject of the existence or non-existence of lodes or veins in the Salt Lake No. 3 ground, or as to prior mineral discovery in either, and that there was no evidence to disprove prior mineral discovery in the Salt Lake No. 3.

12. That the court erred in refusing to peremptorily instruct the jury to find a verdict herein for the defendant at the trial, as requested under error assigned as No. 42.

13. That the question of mineral discovery

should have been further excluded from the jury or controlled by giving to the jury the instructions asked by the Defendant, as set out in assignments of error Nos. 42 to 49 inclusive, and each thereof.

14. That the court erred in submitting to the jury for decision the question of whether or not a prior mineral discovery had been made within the Salt Lake No. 3 lode location, as complained of in assignments Nos. 51 to 59 and each thereof inclusive for the reasons hereinbefore set out, and because it is error to instruct the jury upon any hypothesis not presented by competent and conflicting evidence within the issues.

16. And that the court erred in rendering judgment upon the verdicts.

(S.) ABSTRACT OF TESTIMONY BY PLAINTIFFS BELOW, AS TO THE MINERAL CHARACTER OF THE GROUND.

SECTION 493. In abstracting this testimony, it will facilitate reference thereto, to separate it into groups, as we have below. In the first group below, we abstract all the testimony spoken regarding all the ground generally in the Salt Lake No. 3, Midas and Evening Star without restriction to either claim.

In the next group is abstracted all the testimony regarding the Salt Lake No. 3 ground generally, without restriction to any point or locality thereon.

In the last group we abstract all the testimony in regard to particular points or localities or positions on the Salt Lake No. 3.

SECTION 494. GROUP I. *In General, all* 3 *Lode Claims.*

J. J. Healey.

Rec. Page

271-5 I went into that district about July 7, or 8, 1913. Lived and worked for Christensen & Dahl on an adjoining claim continuously from then until Oct. 1,
297 1913; worked every day; then laid off 7 or 8 days between Oct. 1st and 17th, 1913.

271 While working there I used to go out in evenings prospecting. Quit at 3.30 or 4 p. m. Prospected over the ground now the Homestake, and up to the head of the gulch.

Rec. Page

276 I prospected and panned in hard rock, in every cut where it showed a crevice or seam, here and there; never got a color in hard rock.

282 In the workings on all of the claims I was not able to get colors in hard rock.

295 Used a pestle and mortar.

296 Roasted some of the rock, threw it in fire, got it cherry red, cooled, and pounded it up; didn't find a particle of gold. In all the workings made by the owners of the Evening Star, Midas and Salt Lake No. 3 I was not able to get colors, no, not a sign.

297 If evidence were produced here showing $7 or $8 assays from any of these workings, it would not change my opinion as to the lode values.

303-4 I didn't clean out the cuts to see if they were in mineral or vein matter; didn't have to clean them out; took my samples right after Ralph took his.

Those locations looked like they had been made 20 years before; the cuts were pretty well covered in.

Phillips.

315 I have lived in Copper Canyon since Oct. 20, 1913.

317-8 Have prospected the ground through the canyon and vicinity.

347 Miners don't disagree on what is worth locating as a mine, as much as they do on developing, but they do disagree on everything.

Rec. Page

What one miner might think worthless, another might or might not think he had made a great discovery on. I can't tell what a man might do.

348 Prospectors do disagree as to what is worth locating as a mining claim.

One prospector may pass over ground without locating it, and another will locate it, but the last doesn't always see what the first fellow saw.

That is the history of all mining claims, that one may see what the other fellow don't; and the two may see the same thing and disagree as to its merits.

I did no panning on either of the three lode claims, did not clean out the cuts or shafts; could see without cleaning them out.

Q. Then your opinion is based on a rough surface examination? A. I can't explain, can't answer that all at once. If you want my opinion, why I did that. Yes, that's the fact from the examination I made.

E. D. Boyle.

392 Am familiar with portions of the ground embraced within the Guy Davis placer and Salt Lake No. 3.

411 The only examination I ever made of the property was in November, 1913, when I spent two days on the ground (viz. Midas, Evening Star, Homestake, Salt Lake No. 3, and Guy Davis Locations.)

Rec. Page

392 I have a fairly distinct recollection of certain cuts on the ground which I examined.

406 I took some samples, and the assays were made by Mr. Woodbury.

401-2 I examined a number of cuts and some placer openings on the Homestake.

VEIN OR LODE, DEFINITION, ETC.

(As to whether witness found anything in nature of a vein or lode on the ground, he answered:)

407 Well, the distinction between a vein or lode and a fracture zone,—

A vein is any sort of an opening in general country rock, filled with material different from that which surrounds it, and according to the theory of geologists, filled by some one of the agencies which go to make up veins.

408 But a mineral bearing vein and an ordinary vein are two different things.

I did find what geologists would term a vein, yes, there were deposits there which geologists might term a vein.

Geological definition of vein; there are many. Perhaps the best is:

"A deposit filling a fissure or an opening in the general country rock, supplied by hydrothermal or pneumatolitic agencies, as distinguished from a filling

Rec. Page

or matter made by the injection of molten matter into such a cavity or fissure."

409 Any fissure, or break or contact which contains any other matter or filling, will constitute a geological vein, if it does not contain matter injected into it in a molten form—in which case the geologists refer to it by some other name, such as dikes, sills, laccolites and batholiths.

Aside from the geological definition, I did not discover upon that ground what I as a mining engineer or mining man, would consider a lode or vein, as a commercial proposition, which I would locate with the expectation of ever getting commercial returns.

I saw nothing on the grounds which I would consider a lode or vein.

I saw nothing which, as a mining man, I would consider worthy of work or development with the expectation of finding ore within these three lode claims. I did not.

COUNTRY ROCK—Character of the.

421 I took the prevailing formation to Weber quartzite.

421-7 Indebted to Clarence King for this opinion.

421 Confirmed to witness by Prof. Jones of University of Nevada.

421-427 We crushed rock samples, put it under field of microscope and water.

Rec. Page

You could not determine in such a simple test as that distinguish between quartz and aluminum, and I didn't say I knew it was Weber quartzite, but think it is the quartzite which Clarence King refers to as Weber quartzite. Geologists name these rocks much as a miner goes out and names a claim; has to have something to refer to by.

427 If I said positively it was any particular formation, want it modified right now, none of us can do that without elaborate determinations, and we are not sure then.

428 I have said repeatedly I don't know what the formation is, but believe it is quartzite.

If it is quartzite, it has nothing whatever to do with the value of the claims.

The quartzite of both these ranges (the Battle Mountain and the Shoshone ranges) if they are quartzite as I believe, contain valuable mineral deposits.

430 The fractures are apt to dip in any direction. let us assume for argument, that this is quartzite, and that it was thrust up by agencies of different character—bent up—this huge mass of material several hundred or thousand feet thick; it is not so inflexible that it could be thrust up in that shape, or thrust down by faulting, without cracking in a great many directions, and every one of those cracks represent a fracture zone that may dip in any direction.

Rec. Page

VEIN OR LODE, DEFINITION.

431 A vein is a mineralized fissure, filling or fracture in country rock, with the qualification that, from a geological standpoint, that filling should be made by either hydrothermal or gaseous action.

In simple language, it is different material than the surrounding country rock on each side of fracture or opening, yes.

It is true that wherever there are fractures or shear zones, the mineralizing waters may flow and deposit mineral.

Anywhere where there is fracture, whether it is in sedimentary or igneous rock the mineralizing waters may flow and deposit ore by cavity-filling or replacement, or interstitial filling, or impregnation.

432 Mineralizing waters may have flowed in the fractures on these three claims, which deposited mineral values, yes, but I am rather in doubt if they did, because I didn't see any evidence of it.

433 I saw a very splendid lode mineral deposit on the Washington lode claim, which is about the width of a claim, 500 or 600 feet from the easterly side line of the Guy Davis claim, but the deposit dips away from, not under, the ground in controversy.

Moran.

351 I went over this ground the other days when I was making the survey.

I examined the cuts and openings on the ground.

Rec. Page

361 I made a field examination, quite a careful examination.

I made no microscopic tests, to determine whether it was quartzite or other formation.

I made no particular tests.

372 I could not say that I made a very close test of it.

376 I stated before that I didn't make a very careful close examination of it.

381 I did not make an expert geological or petrological examination of the rock; I so stated several times.

361 The country rock on all 3 of the lode claims is quartzite, or something very similar.

362 It is possible to develop ore bodies in quartzite, but it is not favorable to it.

Mines have been developed in such sedimentary rocks.

362-3 With high grade ore to start with, a careful mining man would continue on it in that formation.

Even if the shear zones are tight, the ore may be formed in them by replacement, yes.

PAY ORE.

363 I would not consider the claims of any value, unless there was high grade ore to start with in such formation. I would not spend a cent trying to de-

Rec. Page

velop them. The conditions here do not warrant development, tho in other quarzite formations, they might.

364-5 Why? Well, I never sampled or assayed any of the material, but appears like "hungry looking material."

If I had assayed it and it was high grade, I would develop it, certainly.

I don't say I can determine whether material in a fracture carries values, by appearance altogether, no.

VALUES.

I would not pass an absolute opinion without an assay.

I would not turn down an ore deposit until I determine the values, no.

I only state from my observation as to these claims.

I would not change my opinion if **any values** should develop in them, nor if one or two dollars would I consider it worth developing.

366 Yes, I know many mines that pay from the grass roots.

All mines do not do they? A. They have done it.

Values might increase from $1 or $1.50 to big values in a new district, that there has been no work done in.

Rec. Page

If there should appear that on an adjoining claim very much valuable ore has been extracted, that would not change my opinion. No.

367-8 Do not believe the size of the vein to be a controlling factor in its value. No.

368 Q. You think if the fracture, or seam, or shear zone is very small, it might still be a very likely mine, do you? A. If the ore was very valuable.

369 Q. Then do I understand you to say that a matter of fractures, or the size of the fractures or shear zones is not important. A. Not altogether, no; the value of ore has a great deal to do with it.

370 Q. Is it a fact that because this formation is quartzite, it is not necesarily against the mineral value of the claims? A. It is unfavorable for it, the ore formation. * * I would give it as my opinion that it is very unfavorable, and especially where you don't have rich ore at the surface to develop your mine from.

Q. Well it comes to this, Mr. Moran, that the controlling factor with you is whether there is rich ore on the surface, isn't it? A. That is one of the
371 factors.

Q. That is one of the controlling factors with you? A. Yes.

Q. Is it a fact that if there were some values at the surface it might pay to work it as a mine? A. I said there are some values in every mine; I would

not say some values; if there was any high grade ore, or ore that was profitable, I would spend money to develop it.

Q. As you said a while ago, very many mines do not pay from the grass roots, as the miner says?

A. No, they don't extract commercial ore from the grass roots.

(For defendant's testimony in general as to mineralized conditions on all three lode claims, see Secs. 502-503.)

SECTION 495. GROUP II. *In General, on Salt Lake No.* 3.

Van Orman.

236 The Guy Davis claim was located September 5, 1913.

232-7 Found no vein or lode on the ground, and no location notice, nor workings, with certain exceptions.

Nothing outside of chemically stained quartzite; that country had the appearance on first sight of being highly mineralized, which proved to be barren on investigation. I panned it; found nothing which would justify me as a miner, or any reasonable person, in developing it—as a lode claim. I did not.

Rec. Page

239 There are outcrops in different parts of the claim, examined the same close; panned it, broke it, examined it in various ways characteristic of prospectors' tactics; found no mineral characteristics short of iron.

239 The formation near the leaching plant is hard and solid in some instances, and discolored by chemical and iron stains, coming from gaseous fumes emanating throughout that region.

Yes, numerous stains from the mill penetrate and stain the wash and gravels.

354 I did not find anything in the nature of a vein or lode which I would consider as such. My answer applies to Salt Lake No. 3.

L. O. Ray.

253 In summer and fall, 1913, resided in Copper Canyon; worked on the placer ground of Healey and Scott, called the Homestake.

256 Q. Did you go over the Salt Lake No. 3—Guy Davis' placer? A. Yes.

Q. How thoroughly? A. I have been all up and down the gulch and around where the mill is. There may be portions on the northeast corner of the Salt Lake No. 3 up above the road that I have not been on, but outside of that I have been very well over it.

Q. Did you examine this Salt Lake No. 3—Guy Davis' placer with reference to ascertaining whether

Rec. Page

there were any lodes or veins showing on it? A. I never saw anything—

Q. Did you examine it? A. I did to a certain extent.

Q. For that purpose? A. I did.

Q. What did you find? (Objected to because having relocated plaintiffs' are estopped to deny the mineral character of the claim).

(Overruled; exception; same to go to all that class of testimony.)

257 A. Well up on the road above the mill, and up on the hill like, on the north side of Salt Lake No. 3, where the formation shows, there is seams there that would indicate that there might be some mineral in it, but I found nothing that would indicate a lode there.

Q. Did you do any panning in hard rock? A No, I did not.

259 I made no chemical or field tests. The placer shafts are the only ones I saw or examined. I never examined them for vein or lode, examined the gravel at bed rock; no veins or lodes in those I have been in; in the others I don't know.

260 I examined the outcrops near the mill; that is where I said there were fractures and seams that might have ore.

Rec. Page

Miners disagree on what is locatable ground, and what is worth developing as a mine.

One passes up what another will locate; always difference of opinion as to the value of mining ground. Experts even disagree.

I did not pan from the fractures and seams above the road on Salt Lake No. 3. I did not pan the rock from those, could not testify they do not carry values.

263 I would not as a miner locate Salt Lake No. 3 for mining purposes; others might do so, develop and spend money on it, who have made a more careful examination than I have, and who know more or less than I about mining, and who are reasonable persons.

J. J. Healey.

289 I am familiar with the ground covered by the Salt Lake No. 3—Guy Davis placer, yes. I have been over that a great many times. Have prospected that ground, yes; have done panning on it.
290 Panned for placer. Found colors in several places.

294 I have been over that ground since and prospected it, yes.

Q. In your examination of that ground is there anything on it which in your experience as a miner you would call a lode?

A. No, sir.

Q. Did you find anything in the nature of a lode or vein which would justify exploration or work?

Rec. Page

A. No, sir.

R. L. Phillips.

329 Do you know the Guy Davis—Salt Lake No. 3?

A. I do.

Q. Did you examine that about the same time you went in there?

A. I did. I ran out the lines and looked for the monuments.

I have been around the boundaries of the Salt Lake 3, yes.

335 Q. Did you prospect over the ground to ascertain whether there were any ledges? A. I did.

Q. Have you done so since that time? A. I have.

Q. Did you find anything which in your opinion would constitute a ledge? A. I did not.

Q. Within your term of it, as a miner? A. No, sir.

340 Estimates placer values on Homestake and Guy Davis locations at $100,000.

(For Defendant's witnesses testimnoy, see Secs. 502-503 post.)

Rec. Page

GROUP III.

SECTION 496. *Center Line of Salt Lake No.* 3.

D. S. Van Orman.

234 Along the center line of the claim, there is no hard rock. I mean approximately in the center line—
238 in the main gulch. There is hard rock on the east and west sides, in place; it would be 200 feet I judge from the location point to where there is any hard rock.

234-5 The portion containing placer is in the gulch, a little off to one side from the center.

238 When I said no hard rock along the center line; I mean approximately the center, but I am referring to the main gulch.

J. J. Healey.

239 I didn't go into the well.

290 I have been along the center line with Moran and Pickett and Adams. It is absolutely wash from one end to the other; there is no hard rock exposed at any point.

R. L. Phillips.

331 I have been over the center line, with Pickett, from end to end. From the north end it is in a gulch a little over half way; then goes over a ridge

Rec. Page

or hog-back; then it flattens off again. There is no country or hard rock exposed; and nothing in the shape of a lode or vein exposed.

W. J. Moran.

352 I paid attention to the center or lode line, and the formation. It is all surface wash, or material. There is no vein or lode, or hard rock, disclosed from one end to the other.

(For Defendant's testimony covering this subject see Sec. 504 post; and Secs. 467-471 ante.)

SECTION 497. *Discovery Point on Salt Lake No.* 3.

W. J. Moran.

214 Am a mining engineer and U. S. Mining Surveyor.

215 On the 14th and 15th May, 1915, made a survey of the ground in the Salt Lake No. 3, Midas, Evening Star, Homestake and Guy Davis placers. Made map, Plaintiffs' Exhibit A.

217 Found no monument at discovery point on the Salt Lake No. 3. I found the point by having access

Rec. Page

to the official notes of Survey No. 4175, of the patent application.

222 The point so indicated by patent plat is in the wash of the canyon. If there had been a monument there some years ago, it may have been destroyed or obliterated. That frequently happens.

224 There is a post that stands practically in Cut No. "2" on the map Exhibit A; would not say that post had not been carried to that point; it was not fixed in the soil, just standing on the edge of the cut.

D. S. Van Orman.

227 Was locator of the Guy Davis claim.

237 I looked over the ground. Found no location notice or monument on the ground.

241 I remember numerous cloudbursts in the vicinity.

240 There is constant wash in the canyon.

Discovery point is in canyon.

J. J. Healey.

290-299 Have been at that point (discovery) as shown on the map, with Adams, Pickett and Moran; drove a peg there; it is sagebrush and was there; tho nearest hard rock is 175 to 200 feet east; northeast and west is hard rock; and to the east; to the west, none; there is some right west of the location monument, and some on the NW corner about 300 feet from discovery monument; there are croppings near, north

Rec. Page

of, and above the mill; and some east of mill, but off the claim.

R. L. Phillips.

329-330 Familiar with the point so marked on map; know where it is. Material there is wash, about 52 feet deep; other shafts in canyon are 52 and 54 feet deep to bed rock.

332 It is 200 feet or more to the east, to any rock croppings, but to the NE it is closer to hard rock croppings.

342 Nearest is in the gulch above the house, to the west.

108 None in 40 feet of location point; it is all wash in there and no rock croppings in 40 feet SW from it.

W. J. Moran.

352 Formation at that point is wash; surface material covered with brush.

(For testimony of Defendant's witnesses see Secs. 457-464, and generally Sec. 469 ante.)

SECTION 498. *Open Cuts on Salt Lake Lake No.* 3. (North End.)

Rec. Page

Nos. 1 and 2 on map, Paintiffs' Exhibit A;
Nos. 2 and 14 on map, Defendant's Exhibit 5.

W. J. Moran.

387 XQ. Now there is an open cut on Salt Lake No. 3 which you designate as No. 1 on your map; did you say in that open cut you saw no evidence of a vein or lode? A. In No. 1?

XQ. No, in No. 2?

382 A. Why, there is an exposure in there; I would call it more of a slip, I think, than I would a lode.

MR. THATCHER: Where is that?

MR. SPRINGMEYER: Point No. 2 on Salt Lake No. 3?

MR. THATCHER: I object to that on the ground it is not proper cross-examination. No questions were asked of him with reference to that cut—neither 1 nor 2, no questions were asked.

THE COURT: You evidently have that confused.

XQ. Didn't you say there were no lodes or veins on Salt Lake No. 3?

A. I am not positive as to that.

MR. THATCHER: No lodes on the ground, yes; but no examination was made of the surface about cut No. 2.

Rec. Page

XQ. You did say, Mr. Moran, that there were no lodes or veins on Salt Lake No. 3, didn't you?

383 A. I am not certain as to just how I stated it. *** I don't believe that there is.

XQ. But you do say there is a "slip" at the point marked point No. 2 on your map?

A. That would be shaft No. 1. I am confused in the numbers. I designated it as a shaft. It is right next to the road leading to the mill, at this point here (indicating on map).

THE COURT: What is the number of that point?

MR. THATCHER: Number 1.

XQ. You say there is a slip there?

A. There is a slip or fracture.

XQ. Would you say there is nothing whatever at point No. 2?

A. There is a break in the formation. I would not call it a ledge.

XQ. At point No. 1 there is what you term a **slip** in the formation, and at point No. 2 what you term a **break** in the formation?

A. It is a break in that country rock, a fracture.

384 XQ. A break in the country rock; it is kind of hard to designate it as a lode; it is practically on the surface.

Rec. Page

XQ. Well is is 6 or 7 feet deep there, isn't it?

A. Yes, 6 or 7 feet deep easily; that is, the total cut. I am not sure but that consists of some wash.

XQ. Well you don't mean to say you can have a break or slip in the wash, do you, Mr. Moran? A. No, I do not.

XQ. And that must be in the solid formation if there is a break?

A. Yes, sir.

XQ. Also at point No. 1 where there is a **slip**, it must be solid formation, must it not?

A. That is solid formation at No. 1.

XQ. Might ore be sometimes deposited in what is termed by you a **break** in the solid formation? A. Yes, sir.

XQ. If it were to develop that this break in the solid formation at point No. 2 were to carry values of $5.80, $9.60 and $11.30 per ton in three different samples, would you conclude that possibly Salt Lake No. 3 might be workable as a lode mining claim?

A. I think if I got assays of that value I would develop the ground, to determine the extent of that ore.

XQ.Then so far as the formation at point No. 2 on Salt Lake No. 3 is concerned, you don't want the

Rec. Page

jury to understand that it is unfavorable for the formation of ore, do you?

A. Well I took no samples and made no assays from there; I could not pass an opinion on that.

385 XQ. Well, without taking samples and assays how can you say there are no veins or lodes, Mr. Moran? A. No veins or lodes?

XQ. Yes, you said on direct examination there are no veins or lodes on Salt Lake No. 3?

A. I would not say there are veins or lodes on Salt Lake No. 3. There is what I would call a fracture at improvement No. 1, on the shaft right next to the road; it may be termed a vein; I usually refer to it as a fracture.

XQ. But until you make assays of all the fractures, breaks and slips, you are not prepared to say that there are no veins or lodes that might develop into pay ore, are you?

A. No. If I got a reasonably good assay for instance in shaft No. 1, I would probably call that a lode or ledge. If I got an assay of fifty cents, or something of that kind, possibly better, I would not say so.

XQ. If you got values of $5.80; $9.60 and $11.30 in three different samples in cut No. 2, you would say it might be worth while to develop it as a mine, wouldn't you? A. Yes.

Rec. Page

R. L. Phillips.

I have been over the ground of the Salt Lake No. 3—Guy Davis, Midas and Evening Star within the last few weeks. I took 12 samples and turned them over to Mr. Thatcher (attorney for plaintiffs). Sample No. 1 (2 samples) came out of the **shaft** marked **"1"** on the map, above the wagon road.

(See also pp. 507 and 1190.)

1191 One sample, No. 1, assayed Trace in gold and silver; the other sample assayed .04 oz. gold, .82 cents; 1.04 oz. silver, .52 cents; 0% copper; value per ton, $1.34.

505 My sample No. 3 was taken from the cut No. 2 on map, Salt Lake No. 3.

(See also pp. 507, 523 and 1190.)

1190 Sample No. 3 assayed Trace, in gold and silver.

(For Defendant's testimony as to these two cuts Nos. 1 and 2, see Sections 505-506 post.)

SECTION 499. *Open Cut on Salt Lake No.* 3.

No. 3 on map, Plaintiffs' Exhibit A.
"A" on map, Defendant's Exhibit 5.

Rec. Page

J. J. Healey.

293 I found an old open cut that had been dug out, behind the cabin "K" on the map, in the wash; never measured dimensions—about 3 feet high, like excavation for a tent or cabin.

R. L. Phillips.

505 Within last few weeks have been over the ground in the Salt Lake No. 3, Midas and Evening Star, of which my sample No. 4 was taken from the cut marked "3" on map Exhibit A; that work was done in July or Aug., 1914.

No assay of this sample reported in evidence.

(For defendant's testimnoy on this cut, see Sec. 507 post.)

SECTION 500. *Mill Cut or Excavation on Salt Lake No.* 3.

"Mill Cut" on map, Plaintiffs' Exhibit A;
"21" on map, Defendant's Exhibit 5.

R. L. Phillips.

333 And the excavations for the mill and tanks was there.

Page

339 I have examined in and around the mill pretty thoroughly and in the mill itself and the excavations for the mill and did not at any time find a vein or lode in place in there.

W. J. Moran.

352-3 There were chemical stains on the rock covered by the mill and below it, evidently made from a solution of copper sulphate leaching from the mill. A great deal of sulphuric acid is used I believe, and the ore reduced to copper sulphate, which is bluestone.

354 I examined and found no lode in or about the mill.

E. D. Boyle.

401 I examined under the mill which is in a set of benches on the side hill, and the exposure in those openings. I recall a fault crossing at about right angles to the lode line of the Salt Lake No. 3 in the lower bench of the mill excavation. It was a crushed zone of quartzite, somewhat kaolinized, a fracture zone, a fault; I took assays from that.

I delivered them to Mr. Woodbury, the local assayer, and I received his certificate from those assays which were introduced in evidence at the last hearing of this case. I took no other assays from there.

447 My sample No. 7 was taken from a small seam in the lowest excavation of the mill.

Rec. Page

478 It was assayed by Mr. Woodbury, the assayer, and his certificate Plaintiffs' Exhibit A-U shows as follows:

479 Assay No. 276, Sample No. 7, Gold, none; Silver, none; Value per ton, none. Plaintiff's Exhibit V, shows Sample No. 7, Copper, Trace.

(For Defendant's testimnoy as to this cut or excavation, see Sec. 508, post.)

SECTION 501. *Mill-Road Excavation on Salt Lake No.* 3.

(Shown on both maps) and in photo exhibits.)

R. L. Phillips.

333 The road was excavated up to the mill.

504 I have been over the ground in the Salt Lake No. 3, Midas and Evening Star within the last few weeks and took 12 samples and turned over to Plaintiffs' attorney. Of these samples, Sample No. 2 (2 samples) from just above the road southeast of the shaft.

507 Plaintiffs' offer in evidence the assay certificate of the two samples separately taken and designated "Ore Sample No. 2", Salt Lake No. 3, as Plaintiffs' Exhibit A-4.

Rec. Page

510 Said certificate A-4 was put in evidence, and reads:

"Ore sample No. 2, S. L. No. 3, Gold, trace; Silver, trace; Value, Trace."

"Ore sample No. 2, S. L. No. 3, Gold, oz. .02; Silver, oz. .44; Copper, 9%; Val. 41c; Val. .22c; per ton, .63c.

CROSS-EXAMINATION.

513 As to sample No. "2", wasn't that done subsequent to the location of the Guy Davis placer?

A. There has been some work done there, yes.

Defendant moves to strike it out.

514 My sample No. 2 was taken right on the road. Road has been there since 1913 to my knowledge. From what I know of the ground it has been there since before the location of the placers.

The sample No. 2 was taken just above the road where the road had been stripped off, and there has been a little picking done since, just the bank picked off. It was all on the surface practically, in plain view to every one.

515 It was above the road, southeast of the shaft, i. e. it is toward the mill from the shaft.

1160-1 The Court having at the close of the evidence ruled to adimit certain assays taken by Tibby, Phillips and Healey.

Rec. Page
1192 Healey samples Nos. 1 and 2 taken from the road excavation, and the assay certificate reads:

Gold 0; silver, 0; copper, 0; value, 0.

(For Defendant's testimony as to this cut or excavation, see Section 509, post.)

(T) LODES AND VEINS—DEFENDANT'S TESTIMONY.

LODES AND VEINS—Defendant's Testimony.

GROUP I.

SECTION 502. *In General, on All Three Lode Claims.*

Topography. Geology of Copper Canyon. Solubility of Copper, Etc. Effects of Weathering on Lodes and Veins at Surface. Origin of Placer Deposits.

Parker Liddell.

Rec. Page
753-4 All three of these claims cover the smaller hills in the immediate copper canyon and vicinity. The actual formation and rock in place can be seen at many places on any one of the three claims. At the north-west corner of the Salt Lake No. 3 there is a cropping in which the rocks are ragged and jagged and very plainly visible. On the northeasterly portion of the Salt Lake No. 3 there are a number of outcroppings, and the general hillside is typical of the formation and rock in place. On the easterly side of the Salt Lake No. 3, about the center of the claim, there is a ridge that runs down into Copper Canyon, where the cropping can be seen.

Benj. F. Tibby.

539-40 **Residence and Qualifications.** Reside in Salt Lake City. Mining engineer and geologist. Graduated from State School of Mines of University of Utah in 1905; part of my undergraduate experience

Rec. Page

was in Stanford University, California. In 1909-1910 one year of post-graduate work in University of Utah, specializing in minerology and petrology—the study of rocks.

Since my graduation I have followed the business of mining engineering, and have been employed by the American Smelting & Refining Company one year nad a half; employed as mining engineer for Utah Apex Mining Co., Bingham, Utah; International Smelting & Ref. Co., less than a year; then went into practice with my father in general consulting and engineering work; but during that period have done practical mining in operating properties.

Maps Defendants Exhibit 5. Was in Copper Canyon, Lander County, Nevada, Feb. 18, 19, 20, 21, 1915 and made map of Salt Lake No. 3, Midas and

554 Evening Star. Admitted in evidence.

889 I made a thorough examination of all the surface in the three claims, as well as some of the adjacent ground, and I went into a number of workings on the three claims—in order to determine the nature of the country rock and general formation.

(For his exam. of the cuts and openings, see Sections 505-509.)

932 **Geology of Canyon.** I found quartzite flanking the claims to the west and forming the backbone of the hill to the west from the claims.

933 Q. Have you indicated the line between the quartzite and the alaskite on the map?

Rec. Page

A. I have shown the quartzite in red and the igneous rock in green. The line of demarkation as I have shown it there is not absolutely fixed since it is hard to trace the exact line, but that represents it approximately. There is no quartzite float on the part where there is alaskite—not up on that side hill.

I have termed the general country rock on these claims alaskite; for practical purposes we may term it rhyolite,—on the Midas, Evening Star and Salt Lake No. 3. It is an igneous rock.

934 The constituent minerals of alaskite were very definite and fixed,—the rock as I have designated it.

Near the mill I found traces of biotite. It is possible for biotite to occur in quartzite only in exceedingly small quantities as an impurity of some kind. Biotite is one of the micas, common black mica. It cannot occur in quartzite because it is one of the primary constituents of igneous rocks, and that is the source of it. We expect to find no biotite in quartzite.

The rock offered by plaintiffs in cross-examination of Mr. Liddell (Exhibit A-B) I would say is the same general country rock I have designated as
935 alaskite. It scratches with a knife in place; quartzite does not.

There is an intrusion of quartz diorite southeasterly from the mill, which is another and later igneous rock; it is closely connected with the copper deposits of this group, situate without the boundaries of the claim; and undoubtedly has some genetic con-

Rec. Page

nection with the copper veins on the north end of Salt Lake No. 3.

936 The quartzite was laid down first as sandstone which was later metamorphosed into quartzite; following that the alaskite came and lifted the quartzite beds up, tipping them to the west; following this came the intrusion of quartz diorite, and likewise of these quartz veins; relative time of the quartz diorite and quartz veins cannot be stated, but both later than the alaskite, which lifted up the quartzite beds and tipped them to the west.

I found appreciable amounts of copper in all the samples I took.

Q. Does that indicate anything with reference to the outcrops?

A. Only this. *Copper is a very soluble* mineral and if we get appreciable amounts near the surface where the weathering has been extreme, we would expect to find even greater quantities a little lower down possibly, since those minerals are taken in solution and carried down in the process of weathering.

937 In many cases the presence of a small amount of copper in the outcrop is no basis for what may be found below; often developed into large ore bodies down below.

The same conditions are very typical of the veins at Butte, where the copper values in the outcrop were practically nothing, and the early mining was done for gold and silver. Later these copper deposits

Rec. Page

of great size were discovered in prospecting and mining the gold and silver in the upper part of the outcrop.

The formation is not the same as at Butte. The Butte formation consists of veins in granite,—an igneous rock by the way. The Mountain View went down 200 feet or more, before they found anything.

938 The *origin of placer* gold deposits is from veins or lodes due to weathering away of bold-bearing veins or lodes; the gold is gradually transported down the hillside and into the stream bottom, and there is carried further still and caught in the irregularities of bed rock. So that all the placer gold came from veins or lodes originally.

Q. Is that the condition in Copper Canyon?

A. I think the placer gold there originated on the hillsides adjacent to the claim.
A vein does not always show on the surface as a bold outcropping, no; where the vein material is softer than the surrounding country rock, the outcrop, if we may so call it, is evidenced by a depression rather than an outcrop in the ground.

.025 in gold is often paid for by the smelters in shipments containing other metals.

(For Plaintiffs' witnesses' testimony in general, see Secs. 494-495 ante.)

SECTION 505. *In General—Continued.*

Veins and Lodes. Petrological and Scientific Tests of the Vein Matter and Country Rock. Chemical and Photographic Processes. Distinctions Resulting Between Vein Quartz and Other Quartzite and Salicious Materials under these Tests and Processes.

Benj. F. Tibby.

Rec. Page

925 I took samples of the country rock from various parts of these three claims, yes; and made both chemical and microscopic tests of this Evening Star quartz, to determine the hardness and specific gravity.

Q. You said you made chemical tests also.? A. Yes.

Q. What is the chemical composition of quartzite?

925 A. Well, quartzite is composed of quartz or silicia, chemically it would be silica.

925 Q. And what is the composition of vein quartz?

THE COURT: Of what kind of quartz?

MR. SPRINGMEYER: Vein quartz.

A. Vein quartz is composed of silica, the same as quartzite.

Q. An opal is also composed of silicia, is it not?

A. It is; the mineral opal is the same thing; and when I speak of opal here, I don't mean the gem opal, but the vein filling opal; is is composed of the same material—silica.

Q. You say that three are composed of the same material, opal, vein quartz and quartzite?

A. They are, yes, sir.

Q. What is the difference between the three?

A. Well, the essential difference, of course, first of all, is in the method of formation; they also have different characteristics under the microscope, and they have different characteristics when treated with certain kinds of acids and alkalies. The quartzite is material which is laid down in seas or lakes; it is the ordinary sand of the river bottoms, which has been cemented by great pressure which has been put on top of it.

The vain quartz is a crystalline material that has been deposited from solution, and it is the common constituent of gold quartz veins.

The opaline variety of vein quartz, if we may so term it, is of the same composition as the vein quartz, but has important differences, both in their

Rec. Page

actions with chemicals, and as examined under the microscope.

Q. Did you apply tests to determine the character of the silica, what you say is the vein or lode?

A. I did, yes, sir.

926 Q. What tests did you apply?

A. I weighed the material—determined its specific gravity, in other words.

JUROR: What is the standard?

A. The standard is water with a weight of one; this material had a comparative weight of about 2.2; the vein quartz would have a specific gravity slightly higher than that.

I then took a sample of this and boiled it in what we call a caustic alkali; only the opaline variety of quariety of quartz is soluble in that material; quartzite, or the typical vein quartz, is not soluble in caustic alkali. The result of the test was that ninety per cent of this material went in solution, proving that this material was not of sedimentary origin, or quartzite, but was material that had been deposited from hot waters at some time or other.

Q. Did you make any other tests or examination?

A. I made certain microscopic tests, by taking a piece of the rock and grinding it down to the fineness of about 1-750 part of an inch; practically every rock is transparent under the microscope, and using the proper kind of a microscope; various minerals dis-

Rec. Page

play certain fixed characteristics, so when you get a thin section of this and put it under the microscope, there is no difficulty in telling exactly what you have under there.

Q. Did you make slides of various specimens of rock, the country rock and other rock at this point you have been testifying about?

927 A. I did, I made examinations of this particular vein quartz, of the vein quartz in the Midas lode, in various and numerous places within the boundaries of these three claims, and right adjacent thereto.

Q. Will you examine these photographs, and see whether they are photographs that you made of those microscopic examinations?

(Hands to witness.) A. They are; yes, sir.

Q. Please state from what parts they were taken, and whether or not they accurately represent the material.

A. These two represent what I have termed the Evening Satr vein quartz, and the other three are typical of the country rock.

MR. SPRINGMEYER: We offer each of these in evidence.

MR. THATCHER: No objection.

(Photographs are admitted in evidence and marked Defendant's Exhibits Nos. 22, 23, 24, 25 and 26. These accompany the certified transcript of record from court below, which see.)

Rec. Page

MR. SPRINGMEYER: Q. Will you please explain to the court and jury the reasons for arriving at your conclusions and deductions in each of the instances in which you made the microscopic examination?

A. These two photographs are pictures of what was visible under the microscope; and I want to say here that the examination of rocks under the microscope is not a purely scientific method of determining what we have; it has a very practical value, for the reason that we apply a hand lens to
938 a rock and see it a little better, we can apply this method of examination, and determine things that are not otherwise visible.

These two photographs, which are practically identical, represent the vein quartz material as shown in this broad yellow line (indicating on defendant's map, Exhibit No. 5); under the microscope the greater part of the material is almost black; now that is characteristic of only one kind of quartz; it is not characteristic of a quartzite, or a rock laid down in the sea bottom or lake bottom; it is typical of material deposited from hot solutions; therefore, the ordinary vein deposition.

These little light colored streaks running through here, and shown on both the photographs, are streaks of what we have called secondary quartz, or typical vein quartz, representing in character the same material which is disclosed in the Midas shaft; and you can see the very characteristic difference between

Rec. Page

the typical vein quartz and this opal variety surrounding it; no such conditions as that could exist in sedimentary rock.

Therefore, I have come to the conclusion that that material was deposited there from a solution of some kind coming up through a fissure or crack in the general country rock.

Q. Did you make any microscopic examinations of the specimens of country rock you took from various parts of these three claims?

A. I did, I made a number of slides, some fifty in all, to determine the characteristics of the general country rock. These three photographs which I have (Exhibits 24, 25 and 26), are representative of the examinations covering those fifty slides. The same
929 rule applies in studying a rock of this kind as it does in studying this vein quartz.

This material which I have marked in green here, and designated as alaskite, is an igneous rock; the term "alaskite" I might say, is for all practical purposes the same as rhyolite; it is a material which has been welled up in the center of the earth in a molten or fluid condition, and later has cooled.

Now these photographs which I have here are representative of that material; and prove conclusively that it is not a quartzite or sedimentary rock; it is an igneous rock. We have here these light spaces, that is the quartz; now that is the same kind of quartz which you see in a quartzite, and as you can

Rec. Page

see from those other photographs, that material is essentially different from this.

The whole characteristic of this rock as viewed under the microscope is not a sedimentary rock. There is another mineral in there, which I have marked "S," and which we have termed alaskite, that is simply an alteration production of the other minerals, what we call feldspar, which is a common constituent of rhyolites, and this rock I have termed alaskite.

This rock here has been broken, and the material which formed this vein or lode, and this vein or lode has occupied other and very minor fractures in numerous places, or little veinlets, as we might term them, varying in thickness from a sheet of paper up to perhaps an inch or two, but hardly warranting the term vein applied to them.

930 Now this is a sample of country rock you can see running in a straight line right across there—a veinlet of that vein quartz which came from the same source as did this, showing that there has been an action there later which produced those veins.

The other photograph here shows a little broader zone of the same thing, but the other limit of it is not discernible, since it is without the boundaries of the photograph. This material is essentially an igneous rock, with these quartz seams in it, and in some cases these quartz seams are of sufficient size to be termed a vein or lode.

I might add that just below point 14, and exposed

Rec. Page

on the surface, there was a veinlet of this kind, about an inch in thickness, which I followed for a distance of thirty or forty feet right in the solid rock there; I made slides of both the country rock and the quartz material within it, showing that they were essentially different in every respect.

There were certain phases which could be seen in the ground which bore that out, since that little quartz seam of an inch or so in thickness had cooled within the rock, or solidified within the rock, and if you would hit with a hammer, you could break out a little tablet of it, perhaps half the size of this book.

Q. Now the photographs in the order you have testified to them, are what?

A. This first one is what we call the altered alaskite, or the altered igneous rock—had been broken down.

Q. That will be exhibit number 24.

931 A. The next one, number 25, displays slightly different characteristics, since it has been subject to this salicification, or the introduction of the secondary seam of quartz. The same is true of this one; but, as I say, the characteristics of the igneous rock are unmistakable.

JUROR: Can you tell the vein quartz from quartzite with the naked eye?

A. No. you cannot. Very often if the quartzite happens to be of such a fine grain, that you can't

see it, a very fine sand, after it has consolidated the particles are less readily seen than before, and you can't determine by simply looking at it whether you have a quartzite or a vein quartz; and so we have no resort to the microscope again to tell.

In quartzite we find numerous rounded particles, more or less rounded, which have been cemented together through the places where they don't touch, by other quartz.

Now in the vein quartz we find this condition of affairs (draws on blackboard): suppose that is the width of the vein; you find this more or less honeycomb structure, as we term it, where the quartz particles are irregular, and have settled out from a solution of some kind, just the same as salt crystals would solidify out from water.

I might say where the cement material between the particles is quartz, there can be no mistake under the microscope, because this material which fills in the openings takes on certain characteristics possessed by the grain of sand right next to it, and it is very easy to determine just what we have.

Of course in the igneous rock, if we are determining the presence of quartz in there, there are other minerals than quartz in sufficient quantity to tell very readily what we have.

Q. MR. SPRINGMEYER: You have been testifying to the microscopic photographs you made

in the order they are marked as exhibits, have you not? A. I think so. Yes, sir.

(The Court admonishes the jury, and at 5:15 p. m. an adjournment is taken until tomorrow, June 1st, 1915, at 9 o'clock a. m.)

MR. SPRINGMEYER: (Q). With reference to the specimen of rock of which you made these microscopic tests, would it be possible without making such tests, or similar tests, to determine just what the material was? A. It would not, no, sir.

Q. Why? A. Well, because there are certain characteristics that are not observable unless those tests are made, the characteristics which I brought out yesterday.

Q. Any field tests then which might be made would be insufficient to definitely determine the character of the rock, is that true? A. That is true. Yes, sir.

(For testimony of Plaintiff's witnesses in general under this section see Sections 494-495 ante.)

Rec. Page

SECTION 504. *Center Line of Salt Lake No.* 3.

Parker Liddell.

834 For the greater portion of the line from the north end of the claim it runs directly down the gulch and, in doing so, at a point just south from the location monument, there is a ridge that comes down there and extends pretty well into the gulch, and I am pretty certain at that point the rock crops.

There is a wagon road running from the office, which is the building to the northwest of the point given as the location or discovery point, down to what is now the boarding house; and as you leave
835 the office you go up a distinct hill, and on that rise I am quite certain there is rock cropping at that point. I am certain it crops on the ridge. Of course that cropping would be almost easterly and westerly; then going southerly, the line runs over a ridge, but I couldn't state as to having actually found rock croppings there, although the general cropping of the formation would lead me to believe that the whole formation was actually in place. By that I mean the contour of the hill is such as to represent actual formation; that is, you may not see the cropping of any rock, but if you would scratch away the surface dirt you would be right on the formation which composes the hill at that particular point.

You would get to bedrock that forms the hill, yes. I would say that along the side line there too there is solid rock, although not exposed at the surface at all placed.

Rec. Page
854 Southerly from this point (discovery point of Salt Lake No. 3) about 20 to 40 feet is a cropping of hard rock in place.

CROSS-EXAMINATION.

XQ. At any point along the center line, have you ever seen a vein or lode of mineral-bearing rock in place ?

A. I have never seen one that I could definitely state was on the center line ;I think it was mineral-bearing.

XQ. Isn't it a fact that along this line, as a general thing, the whole of the surface is covered with the wash?

855 A. No, there is a ridge coming right down into the claim, which I have just spoken of, near the discovery point; there is also a ridge coming down into the claim towards the south end of the claim which is covered somewhat by brush and soil. Not all points are so covered with brush and soil. The formation is disclosed at points, but with reference to the lode line I couldn't be positive, but I believe it is, yes.

Benj. F. Tibby.

890 In examining the Salt Lake No. 3 I found solid rock, or outcrop, within the claim. I didn't run a survey line, but was all over the ground and I may say that on the lode line there is solid rock exposed. It is towards the southerly end, and I think in the

Rec. Page

vicinity of the north end line, where the lode line crosses there; but not so sure about the north end line.

891 The lode line runs in front of the building marked "8." There are several marked "8", but it is the building nearest the lower left hand corner. If it doesn't run as close to that as it appears from the map, I should say there was solid rock exposed just south of that building, down near the southerly end line, and beyond any of the buildings shown here. I think the red mark placed there by Mr. Liddell repre-,sents the condition there. (Referring to Defendant's Exhibit No. 2.) There is a ridge at the point indicated by counsel in his question.

1008 I know whether there is solid rock on the Salt Lake No. 3, yes—right at the point I am now describing. (Point "21" on map Exhibit A.)

Joseph Ralph.

1008 There is solid rock along the center of the lode line, running lengthwise with the claim, between the office building and the frist bunk house. There is solid rock which comes down and crosses beyond the center lode line. Here is solid rock coming down here.

(For further evidence for Defendant on this subject of the center line see Sections 467-471, ante.)

(For testimony of Plaintiffs' witnesses on this subject see Sec. 496 ante.)

GROUP II.

Conditions at specified cuts, shafts and openings on the Salt Lake No. 3 lode mining claim.

SECTION 505. *Open Cut on North End of Salt Lake No.* 3.

No. 1 on map, Plaintiffs' Exhibit A.

No. 9 on map, Defendant's Exhibit 5.

Parker Liddell.

Rec. Page

753 I went over the claims on May 8, 1915, to examine as to the rock in place, and spent about a month surveying the claims in June, 1913.

764 Yes, I examined the veins or fractures which I knew existed prior to September, 1913, on the Salt Lake No. 3. I went to the grade on the mill road probably 200 feet N W from the mill, and I found there a quartz vein on which a shaft had been sunk, on the inside of the road grade, about 8 feet deep. The road grading was there in 1913, but the shaft I do not believe was there then, but I knew there was

Rec. Page

a vein at approoximately that point, and which I had seen at the time I was on the ground in the summer of 1913. I examined this vein. There was a portion

765 of the vein which was at the bottom of the shaft. I also took the direction of the vein. I paid most attention to it down in the shaft, but as I recollect the vein distinctly shows above the collar of the shaft, that is, what would have been a portion of the road grade which was towards the hillside. I remember there was a vein which ran diagonally across the road at about this point, prior to September, 1913—there was a distinct quartz vein. I could see the quartz material in it. You can see the fractures that represent the walls and, as I remember, it was about 8 or 10 inches wide. I took no samples from any portion of this cut which had been exposed prior to my recent visit.

Q. Did you take any samples from there?

A. Not on a portion of it which had been exposed before my recent visit.

831 Q. Did you take any samples from workings exposed on the Salt Lake No. 3 since September, 1913?

A. Yes, I took two samples from the shaft along the road leading to the mill, at point "9", the Defendant's Exhibit 5, and on point "", the Plaintiffs' Exhibit A.

Q. Was there any vein or mineral-bearing rock

Rec. Page

in place exposed at that point prior to September, 1913, if you know?

A. Yes, it was, by the grading for the road which cut out a portion of the vein, so that in the bank of the road you could see the vein. The sample was taken from the point at the bottom of a ten-foot shaft, or close to the bottom. That vein comes to the sur-
832 face of the road grade as exposed prior to Sept., 1913. That is assay certificate No. 4, and the sample was taken over a 36-inch width of the vein, at the bottom of the shaft. I picked down a certain width, running from one wall to the other of the vein, and then chipped off with a pick the amount which I thought would represent the average of the rock across that width. This assay certificate properly and correctly represents the assay returns or values of the samples that I took.

Said assay certificate from Sample No. 4 was then offered in evidence by the Defendant.

833 The sample was objected to by the Plaintiffs on the same grounds, namely, that it did not sufficiently appear to have been at a point exposed prior to the Placer claim in September, 1913.

The objection was sustained by the Court and the samples rejected, and was not again readmitted. The offered certificate reads as follows:

"Sample No. 4, from 36-inch quartz vein in shaft

Rec. Page

on mill road on Salt Lake No. 3, shows 0.06 ooz. gold; 0.34 oz., silver; total value $1.37, May 12, 1915.

PARKER LIDDELL, Assayer."

(See Assignment of Error No. 40-C).

WITNESS.

833 I took another sample from the Salt Lake No. 3 claim, a chnk of rock from what was the northerly side of the shaft, at point "1" on map, Plaintiffs' Exhibit A, "9" on Defendant's Exhibit 5, at a point about 4 feet above the bottom of the shaft. The rock had a greenish cast to it and I think possibly there was a little copper in it. It is the same shaft that sample No. 4 was taken from. It was the hanging wall rock right outside of the vein.

Assay certificate from the latter sample was offered in evidence.

Objected to on the same grounds, as no exposure before September, 1913.

The objection sustained and the sample and assay certificate rejected and not again readmitted by the Court.

The offered assay certificate shows "Sample No. 5, hanging wall rock over Sample No. 4, 0.04 oz., gold; 0.04, oz., silver; copper, trace: total values, $0.82.
(See Assignment of Error No. 40-D).

Benj. F. Tibby.

539 Is mining engineer and geologist. (Gives technical training and mining experience.)

Rec. Page

889 Visited Salt Lake No. 3 et al, lode mining claims, February 18-21, 1915. Made thorough examination of surface and workings.

899 I took two samples from this point. Examined
900 the shaft on the road to the mill. Other than the
900 vein exposed in shaft found on the northeast bank
901 or upper side of the road indications of fissuring on small scale at several points. In the shaft by the road I traced the vein up to the surface, but not beyond. There is no surface soil covering it there (mouth of shaft).

902 I traced the veins up the sides of the shaft to the surface, but not beyond.

Q. Did that vein lead to the surface of the road at that point?

A. It did, unquestionably, at that point, because there is no surface soil covering it there.

Q. State whether or not the vein extends into the part of the road exposed by the road excavation?

A. Well, it extends at least up to the very upper edge of the shaft, up the side and right to the point where the road would be.

902 The vein is visible on both sides in the bottom of the shaft, well-defined walls, and soft, heavily iron-stained matter.

904 My samples, Nos. 9 and 10, taken from this shaft.

Rec. Page

905 I didn't run a strike beyond the shaft. No. The shaft is sunk right on the road. Yes.

Q. Did it appear on the surface of the road, Mr. Tibby?

A. It did at the very upper edges of the shaft. Yes, sir.

Q. Does the vein run along the road or intersect the road in any way?

906 A. I did not follow it beyond the boundaries I have stated, but it is on the surface of the shaft at the road part. Yes.

1160 The oourt rule to admit certain assays previously excluded and the following Tibbey assays were admitted in evidence.

1164 Sample No. 9 from this cut No. 9, assayed .04 oz. gold; 3.4 oz. silver; .25 per cent copper; total value $3.50.

Sample No. 10 from same cut No. 9 assayed .16 oz. gold; 3-7 oz. silver; .60 per cent copper; total value $8.21.

Joseph Ralph.

956 Q. Did you ever find any mineral-bearing lode or veins on the Salt Lake No. 3? A. Yes.

Q. When did you first find that?

A. I believe the first thing that I noticed on the Salt Lake No. 3 were the veins on the road-way in 1912; but I am not sure whether that vein on

Rec. Page

which the shaft is sunk now is one of them or not, because most of the veins there are vertical in the cut; that is, as you go along the road side there are numerous little veins exposed by the road, but there is a bigger vein there, which has a different strike, on which the shaft has been sunk subsequently, and which is valuable.

That vein where the shaft is sunk runs in a different way, and the strike of it is almost parallel with the road-way, and whether I noticed that in 1912 or not I don't know.

957 I made a little sketch of that condition. I knew of that vein on which the shaft was sunk before the placers were located. I saw after 1912 and before the placers were located. This sketch is made to illustrate the conditions, the size of the vein, its strike and dip.

958 I have seen that vein along the road, have seen it here and here, its width, its exact depth, its exact strike. That sketch is simply to illustrate. Here is the road, and there was a vein coming along here, which would approximate the inner wheel track, then it had cut slightly into that, and then broke across the road and was hard to trace.

959 This sketch illustrates what is in view today.

960 MR. THATCHER: Same objection.

THE COURT: You object to that portion of it which has been disclosed since the location of the placers?

Rec. Page

MR. THATCHER: Yes.

THE COURT: For the present I will sustain the objection to that part of it which has been disclosed since the placer of it which has been disclosed since the placer discovery. That will go until the determination of the question about the samples.

Sketches are marked for identification and withheld.

WITNESS: The red on the sketch represent the vein, yes.

964 The vein exposed on the roadway on which the shaft was sunk subsequently, that may range anywhere from 4 to 10 inches wide. I would say 10,—may be more,—about 10 inches.

Q. In your opinion as a mining engineer, would that carry values, from the appearances?

1035 A. Oh, yes, carry values.

Of the veins by the side of the road the vein on which the shaft was sunk was the biggest, and the only important one there.

1036 I am not going to try to define that, as to where the vein crosses the road, for the reason that when I came here to this trial I hadn't the slightest idea that that four-foot vein would be ruled out. If I had I would have given close detail to the other things which might probably have revealed lodes which would come right down through the claim. I think I could go there on the Salt Lake No. 3 and find
1037 evidence on the surface right down through approximating a lode vein, but I imagined with a four-foot

Rec. Page

vein I did not have to go any further, therefore I didn't make the examination, but I am not going to say that there are no veins which do not go down that way, or don't come down that way.

Q. So far as you know, does the vein which comes along the road on which the shaft is sunk cross the road?

A. I have not traced it. There are out-crops below the road. I have not connected that up . I have traced the strike of the vein only in a very cursory way. Where the shaft is sunk it is almost parallel with the road. I traced it only a few feet from the shaft. To the best of my knowledge it can be seen cutting out the bank there, but after it gets into the sagebrush I don't remember following it. I don't
1038 think it is exactly parallel to the road. I think it veers off slightly to the east. The foot wall exposed in the shaft is not exactly parallel to the shaft, but it is close to parallel.

Witness marked on map, Exhibit A, the course of the veins in the road which he saw in 1912 and says that is the course and directon of those veins, with the exception of the one he eventually sunk the shaft on, and that has a different course.

XQ. Did you see that vein in 1912?

A. I must have seen it there in 1912.

XQ. Can you say "Yes" or "No," that you did see it or not?

Rec. Page

A. I called Captain Case's attention to the vein on that road. The vein on which the shaft was sunk was the biggest and the only important one there, so, although I cannot remember the exact words, etc., that is the only vein on the road which is of economic worth.

(For Plaintiffs' testimony on this cut and cut "2" see Sec. 498 ante.)

SECTION 506. *Open Cut on North End of Salt Lake No.* 3.

No. 2 on map, Plaintiffs' Exhibit A.

No. 14 on map, Defendant's Exhibit 5.

Parker Liddell.

753 During several months months in the summer of 1913, I was making extended surveys for this group of claims and knew the conditions prior to September, 1913. I went over the claims on May 8, 1915, and examined the mineral characteristics in the open cut first referred to, a little NW of the mill; there is a four-foot—

756 MR. THATCHER, interrupting: When did you see this vein you are going to talk about now?

Rec. Page

A. May 8th of this year.

Q. You didn't see it at any time prior to September 6, 1913, did you?

A. Not to recognize it as a vein at that time.

MR. THATCHER: Objected to as incompetent

MR. THATCHER: Objected to as incompetent, irrelevant and immaterial and as being a discovery of the vein which he saw and found after the initiation of the Guy Davis placer.

The discussion and rulings on this objection appear under a separate assignment.

816 At the time I was there before September, 1913, there was an outcrop which showed a plane or wall which might be taken by any ordinary miner to be an indication of a vein or lode. It was simply a wall, showed a plane of movement—and what a person would have supposed to have been a portion of the vein was filled in with surface soil and dirt that had been eroded at that time, and washed in, in the course of years.

819 Yes, I took my sample No. 1 from the Salt Lake No. 3 and from Cut "2" on Plaintiffs' map Exhibit A, "14" on Defendant's Exhibit 5, an open cut. Took it standing up along what is the easterly face of the cut and about 2½ feet below the surface of the ground, at which point I don't know whether it had been exposed before September, 1913. There is cropping in the surface of

Rec. Page

that cut and it extends up to the point where I took the samples, but I don't believe that cropping represents a vein at which I took this sample. The vein at which I took the sample extends to the surface, yes.

821 The material from which I took the sample was a part of the material which extended to the surface in the way of a vein or mineral in place, prior to September, 1913.

Four-foot vein in open cut No. 2 on Salt Lake No. 3. Only one wall—the left hand wall—visible in photograph.

572

Rec. Page
822 The two samples taken from this point were testified as assayed by the witness himself and the assay certificates were offered in evidence, objected to and rejected by the court, and exception.

The certificates read as follows:

"Samples No. 1, 47-inch vein, Salt Lake No. 3 lode 0.10 oz. gold; 0.86 oz. silver; copper, trace; Total value $2.43. May 12, 1915. Parker Liddell, Assayer."

"Sample No. 2, 15-inch vein, hanging wall discovery cut, Salt Lake No. 3, May 12, 1915, 0.04 oz. gold; 1.46 oz. silver; copper, trace. Total value $1.53. May 12, 1915. Parker Liddell, Assayer."

Benj. F. Tibby.

892 I took a photograph of the vein matter or material at this point; took it standing at or near the mouth of this cut and looking toward the face of it. It represents the cut from a little below the surface and including the left-hand corner part of this wall, and part of the face. Photo shows
893 to within 2 or 3 feet of the surface, I should say; don't remember exactly. I did not trace the vein beyond the edges of the cut on the surface, but the vein exposed within the cut reaches up to the 3 or 4 inches of soil on top. The photograph represents part of the vein; represents the condi-

Rec. Page

tions at that point. Photo was taken between 18th and 2t0h February, 1915, made it myself.

899 I took 4 samples from this cut;

904 Numbered 13, 14, 15 and 16.

1160 The court ruled to admit these assays.

They read as follows:

1164-5

Sample No.	Shaft or Cut	Width of Sample	Gold Oz.	Silver Oz.	Copper Per Cent	Total Value
13	14	0.5	.05	1.1	.35	$ 2.84
14	14	0.5	.17	1.0	.55	5.88
15	14	0.2	.19	4.4	1.05	9.78
16	14	0.2	.24	4.8	1.15	11.14

R. H. OFFICER & CO., Assayers, Salt Lake City, Utah.

Joseph Ralph.

785-6 I know the Cut "2," Palintiffs' Exhibit T, Salt Lake No. 3 in Copper Canyon, and knew its condition prior to September, 1913. There was a slight sut there, 7, 8 or 10 feet long, depth scoop shaped, appearance of being old, sides eroded, naturally. Hard to give the dimensions, but probably 18 inches to 2 feet deep. I saw the cut, but made no examination of it.

Rec. Page

965 Q. Do you know of any other outcrops or mineralized veins in place on the Salt Lake No. 3 claim?

A. That is previous to the jumping of the claims?

Q. Yes.

A. That cut to which I have previously testified and where the old stake was eventually found, (cut "14" on Defendant's Exhibit 5, "2" on Plaintiffs' Exhibit A). I knew of an outcrop there prior to the location of the placer claim. It is hard to describe it, as I saw it before the placers. I paid attention to it afterwards. I am

966 up against a condition where to describe an object I have seen on numerous occasions, some of it preceding a certain date and some are subsequent to that time, it is difficult to say how much of my description results from impressions before or after the date. All I can say is there was enough there to have justified me in running ni and finding that four-foot vein. I cannot go further than that.

971 Samples: I took samples of ore and of country rock from the Salt Lake No. 3, from open cut "14," Deefndant's Exhibit 5, "2" Plaintiffs' Exhibit A, and the country rock some fifteen or twenty feet around there. I stood in the cut and took these samples, and it was about even with my face; now whether it was exposed before September 1913, the chances are that I could have gone there

Rec. Page

two years ago and by scratching off the dirt I might have taken it, but I couldn't say that I could.

In September, 1913, there were only croppings, and when I took that there was no cut, and now there is a cut 4 or 5 feet wide, 12-ft. face and 15 feet long, and a 4-ft. vein.

972 The sample was offered in evidence and objected to by Plaintiffs.

THE COURT: About how far below the surface was that taken?

WITNESS: There is an overburden or cliff on the hanging wall of the vein, about, I would say, 1 foot. There was a little solid formation of the same material above it. The lode goes to the surface. The place where I took it may have
973 been a foot under the cut or excavation, as I saw it in 1913. The cut which was originally there is obliterated, so it is hard to say where the old cut ceased and the new one commenced; that would change the whole thing, because that is rather a big excavation there and I was not looking for such questions. I could have taken photographs and answered your Honor's questions directly and intelligently, but I am afraid I cannot now.

I know the excavation includes the old cut, yes, because the old cut is obliterated, gone, unless there is a little bit of it, which I am not sure, right on the extreme inner face.

Rec. Page

THE COURT: You may proceed. I will sustain the objection to that for the present.

974 WITNESS: I took the rock sample I spoke of 15 or 20 feet from there, where the outcrop comes to the surface.

Introduces said sample in a sack present, taken from Salt Lake No. 3, near Cut "2" and the same is placed in evidence, as Defendant's Exhibit No. 29.

This is an igneous rock, which I am advised is Alaskite, but I made no petrological or other test.

(For Plaintiffs' evidence as to this cut or opening and Cut "1" see Sec. 498 ante.)

***SECTION* 507. *Open Cut on Salt Lake No.* 3.**

No. 3 on map, Plaintiffs' Exhibit A.

"A" on map, Defendant's Exhibit 5.

Benj. F. Tibby.

900 Nothing at this point observed beyond fissuring and extreme ateration, and general country rock.

(For Plaintiffs' testimony as to this cut or opening see Sec. 499 ante.)

SECTION 508. *The Mill-Cut or Excavation on Salt Lake No.* 3.

"Mill Cut" on map, Plaintiffs' Exhibit A.

"21" on map, Defendant's Exhibit 5.

Parker Liddell.

Rec. Page

754 At the time I was on the ground on the 8th of this month (May, 1915), the cut just west of the mill building had been run and exposed the actual formation also exposed the vein. That is down quite a few feet below the mill road on the Salt Lake No. 3, and this cut is in the same position of which I spoke of finding the trench at my previous visit. In addi-
755 tion to this cut exposing a vein, there are cuts and excavations that were made for the mill. In the face of that cut there was a vein exposed.

762 Prior to Sept., 1913, I knew that the mill cut had been dug and there had been an excavation made; and I believe that I could also state that there was a fracture or vein in the face of that cut. On May 8th I examined the face of the lower mill cut, and I found a vein from which I took a sample, and which I assayed. The vein is well defined, shows copper stains, is heavily oxidized with iron.

I took oa sample from that point and assayed it myself. That was the lower mill cut, in the face, prac-

Rec. Page

tically in the center, might be a little southeast; it was in a cut in which there was an old leaching tank. This certificate is the correct assay of that sample, marked Defendant's Exhibit No. 15 and shows:

.06 ooz. gold and .60% copper; total value $3.36.

768 Width of sample taken was 32 inches.

CROSS-EXAMINATION..

864 The cut is not within the mill building. That doesn't run quite to the wall of the mill building. The point I took that sample is at the face exposed directly behind this tank, as shown on photograph Defendant's Exhibit No. 3—and Witness places an "X" at the point referred to on the photograph. That sample ran $3.36 per ton.

A. That the process used in the mill was a leaching process in which they used sulphuric acid or ferric liquers or iron solutions to leach out the copper values. The ore run in the mill, was copper ore which contained some gold and silver, as I understand, and came from the adjoining mining claims of the group.

865 There is a distinct stain of copper sulphate on the rocks which are below the leaching tanks, but it is not a fact that all of the rock below the mill is impregnated with leachings from the mill.

It is true the rock is porous.

XQ. And that is where you got this sample from?

Rec. Page

A. Yes, but I picked down the face before takking the sample. I picked in three or four inches before taking the sample from which I got the assay of $3.36. This point where I got the sample was not directly under any of the leaching tanks. There are leaching tanks up in the mill itself, but no leaching tank above that point where I got the sample.

875 I call your attention to a piece of rock and ask you if that is a fairly representative specimen of rock found below the mill?

A. I think you could probably find such a piece as that below the mill. It is exceptional in the amount of copper stain shown on it.

Rock specimen offered in evidence.

MR. SPRINGMEYER: Is that like the vein material from which you took the sample? A. No, sir. I don't want to break it but it seems to be similiar to the country rock in that immediate vicinity.

Objected to. Excluded.

I have been in and around the mill, yes; and in the cuts and excavations below it.

XQ. In the rocks there are stains similar to that?

A. Yes, somewhat similar; I don't remember having seen any exactly like that.

876-7 MR. SPRINGMEYER: We will withdraw our objection; it may go in for what it is worth.

Rec. Page

Admitted by consent, and marked Plaintiffs' Exhibit No. A-8.

REDIRECT EXAMINATION.

878 Q. State what the stain is on that piece of rock (Exhibit A-8)?

A. Typical copper sulphate stain. It comes from the solution used in the mill for extracting copper values from the ore.

Q. Will that stain impregnate rock to a depth of 3 or 4 inches?

A. It is not likely; it might in a long course of years work into very porous rock a few inches. Not in that character of rock in my opinion in 3 years.

When I took that sample I chipped off 3 or 4 inches, yes, and took the sample from comparatively soft much oxidized quartz material; considerably different and much softer than this material, having a
879 typical liminite of iron stain; also showing stains of copper or copper carbonate, and mineral called malachite, distinguished from the copper sulphate by the color. I took it from vein material, yes.

There might possibly be some original malachite stain on this rock (Exhibite A-8), but none that I can find or identify.

768 Width of the sample is on the certificate; 32 inches.

Page

Benj. F. Tibby.

892 I took samples from the bank just below the mill at point marked "21".

895 I found in there a vein about a foot thick, very strongly marked, displaying abundant oxide of iron. The vein is flanked by the country rock is soft and easily picked, is broken up, and contained inclusions of the wall rock in small pieces. That is a soft, porous, broken up material within the hard wall rock.

896 I took a photograph of the conditions exposed there, at this vein which I have just described, which shows correctly the conditions.

The photograph is admitted in evidence, marked Defendant's Exhibit o. 20. The pick shown in the photograph which from the end of the handle to the end of the pick was 12 inches, was simply laid in there to give some relative object to compare the width of the vein. This is the photograph of the vein exposed in the bank. There are no workings there other than the excavations made in 1912.

897 I took one assay there myself of the vein material across about 9 or 10 inches of the vein, about 4 or 5 inches wide and 2 or 3 inches deep, cutting a channel right across the full face of the vein. I picked into that point several inches before I took the sample.

898 The assay is from Sample No. 21 from point "21" on the map gave .03 oz. gold; .02 silver; 1% copper,

Vein in cut or excavation back of mill on the Salt Lake No. 3 lode mining claim.

Rec. Page

making a total value of $4.30; That would be 60 cents for gold; 10 cents, silver and $3.60 copper.

899 I consider the exposure there a mineralized vein, yes, and my reasons are that we have all the essential characteristics of the vein. We have two solid wall rocks, enclosing a material different in character from the wall rocks and carrying appreciable values in gold, silver and copper.

Joseph Jurey.

885 I knew of the excavation work back of the mill in 1912, and I knew of the vein there in 1912. The work of excavating for the mill on that road was done in 1912.

887 That point back of the mill and leaching tanks where I found the vein, when excavated in 1912, is point "21" on Defendant's Exhibit 5.

Benj. F. Tibby.

906 Q. State, from your examination, whether or not, in the workings that were exposed prior to September, 1913, you found nay veins of mineral-bearing rock in place?

A. I did, yes.

Q. Where were those?

A. Well, the one in the mill bank—if I am not permitted to testify to the other two—the vein which occurs within the open cut and the one which exists in the shaft—

Rec. Page

Q. Those are eliminated?

A. Those are eliminated, but that leaves one other than those two of which I have spoken.

Joseph Ralph.

960 I also knew of that vein behind the leaching tank, before the claims were jumped, and also the point where the discovery cut—

THE COURT: When you say behind the leaching tanks, do you mean east or west of it?

961 A. That will be point "21" on Defendant's map, Exhibit 5. It is behind the main leaching tank on the second bench I believe. That is for the excavation for the upper side of the leaching tanks, west of the mill substantially. The mill faces it.

The leaching tanks and the mill are erected on a series of benches, and, say the mill is on the upper two benches, then there will come one set of the leaching tanks, and below that a second set of leaching tanks, and this vein is at the rear of the second set of tanks, practically between the leaching system proper and the mill building; the mill building does not come over. The photograph presented represents it fairly well, and the mill and leaching tank.

962 The photograph is offered in evidence as Defendant's Exhibit 28 and indicates the point, and the witness marks thereon with an "X" the approximate position of the vein to which he just testified.

963 The vein back of the mill, as near as I remember,

Rec. Page

was from 15 inches wide at the widest and narrower at the top—I believe about 10 inches. I never measured it.

Yes, it would carry values. I made no assays.

Parker Liddell.

1199 The vein under the mill was exposed in the face of the cut about 9 feet high and one foot wide. The sample I took was over 32 inches, I believe.

Q. Was that all vein matter?

A. I think it was. The vein cuts across diagonally. You culdn't expose the total amount of vein in that face without taking a full width, which would correspond to the diagonal lines of the vein, across the face.

1200 Now, it happened that this face doesn't actually cut the vein on a plane at right angles to the direction of the vein, which is about northerly and southerly. The excavation for the mill runs northeasterly, and the actual face exposed runs northwesterly.

(For Plaintiffs' testimony as to this cut or opening see Sec. 500 ante.)

Rec. Page

SECTION 509. *Mill Road Cut or Excavation.*

Joseph Jurey.

647 In 1912 a road was built to the mill.

I worked on the road, looking after the men. Found some small veins. Looked like chloride and copper stains, looked to carry gold. One in particular about a foot wide on and close to the surface. Different from the country rock. Vein dipped east. I was foreman.

730 Vein ran northerly and southerly, along the road on the east side. I never assayed nor panned it. I 730 should say it was about 150 feet from the mill down on the road. It was opened or exposed six or seven feet.

Joseph Ralph.

956 Q. Did you find any mineral-bearing veins or lode on the Salt Lake No. 3?

A. Oh, yes. I believe the first thing I noticed on the Salt Lake No. 3 were the veins on the roadway in 1912, but I am not sure whether that vein on which the shaft is sunk now is one of them or not, because most of the veins there are vertical in the cut ;that is, as you go along the roadside there are numerous little veins exposed by the road; but there is a bigger vein there which has a different strike, on which the shaft is sunk, and which is valuable.

958 I have seen the vein here and I have seen it

Rec. Page

here, its width, its depth, its strike. Here is the road and there was a vein, coming along there at approximately the inner wheel track, and there it broke across the road and was hard to trace.

964 The vein exposed on the roadway on which the shaft was sunk subsequently, that may range a nywhere from 4 to 10 inches I would say 10, maybe more. Oh yes I know it carried values.

Mill Road.

975 The road to the mill served as a mining trench, incidentally; it exposed the veins, although it was not run for that purpose.

Vein.

In addition to this one vein, which the sketch previously referred to sohws, along there at frequent intervals, the whole thing is fissured, seamlets; others from which you could take values, undoubtedly, and that is characteristic. The road is cross-cutting the country formation not running with it. It is about 350 feet in length, in solid rock the whole extent, and, in cross-cutting that formation, that means every vein which apexes within the 300 or 350 foot portion is exposed there.

975 It was built for a road, but it would have the effect of developing the vein as well. This all went along parallel with the road a little
976 distance, so that the shaft in going down, prac-

Rec. Page

tically took out that section, and then it came across the road and went into the bank.

Before the road was built a hen couldn't go there and scratch a hole deep enough to make a nest along that road.

On each side of the road these veins will come up; for instance, here is the top of the road. Some of these will be here and you will see them tracing back. I never attempted to trace them back there. I didn't think of their being of sufficient importance or I would have paid more detailed attention to them.

CROSS-EXAMINATION.

1032-1033 XQ. You testified to veins crossing the road. When did you see those veins?

A. In going up the road with Captain Case. They ran east of south and west of north, in a general trend; the general trend is northeast and southeast, but more east of south and west of north.

XQ. Did they cross the road?

A. There is one there that I traced across the road.

XQ. I am asking you of those you saw in 1912?

A. I didn't pay close attention in 1912. I paid some attention.

Rec. Page

XQ. How much attention?

A. Well, the veins on the road—every foot of that road is in blasting rock, and one couldn't walk up the road without seeing them, and I remember noting them and comenting on them, when going up the road with Captain Case in 1912.

1034 Yes, those veins were exposed in the bank of the road, and I saw them in 1912 and their trend and course were such, if continued, they would cross the road, but not at right angles. They would not have followed parallel with the claim, they would have passed out on the east side line of the claim somewhere.

Witness traces the course of the veins on the map, roughly, from memory, with the exception of the one on which he eventually sunk the shaft, and which has a different course.

Parker Liddell.

1198 XQ. How many veins are exposed at the road?

A. I don't know how many. They were a horizontal distance of 5 or 6 feet and a vertical distance of 2 to 4 feet; and the width, whatever the width of the vein happened to be.

(For Plaintiffs' testimony as to this point, see Sec. 501 ante.)

CHAPTER XI.

NONSUIT.

SECTION 510. Under Assignment of Error No. 28 (Sec. 655 post) we complain of the refusal of the Court to grant an order of non-suit against the plaintiffs upon several grounds, viz:

1. Failure of the complaint to state a cause of action;

2. Failure to prove a case for the jury upon their evidence;

3. Fatal Misjoinder of parties Plaintiff disclosed by their own evidence;

4. No ouster or detention proved;

5. Ground not shown vacant and unoccupied but the reverse; etc.

SECTION 511. Ground No. 1 supra is fully treated in Chapter VII, Secs. 229-271 ante.

Grounds Nos. 2 and 3 is based upon their own evidence as considered in Chapter II hereof, which is not a bare omission to prove something which might be supplied by defendant, but affirmative proof of the non-existence of title or right of action in plaintiffs arising upon their own deeds. Defendant does not and could not supplement or supply anything to their own recorded deeds.

Ground No. 4 arises upon their own evidence alone, also upon all the evidence, and is treated in Chapter IX. (Sec. 307-319a.)

Ground No. 5 arises upon their own evidence, also on all the evidence, and is considered in Chapter VIII, Sec. 272-306. There were other grounds of nonsuit specified in the motion and assignment of error No. 28.

SECTION 512. As the plaintiffs' evidence has already been set out at length in the preceding chapters, also defendant's testimony for comparison where witnesses for both have testified, it is unnecessary to repeat the same here, and we proceed to the law on this subject.

SECTION 512a. We are aware that some cases hold it not reversible error, under the Federal appellate practice, to refuse an application by defendant for involuntary nonsuit against the plaintiffs where the defendant does not stand upon his motion, but goes ahead and offers evidence in his own behalf. But this appears to be only in cases where the grounds of non-suit relate to the insufficiency of *plaintiff's evidence* only, (and not where it is directed to the insufficiency of the *plaintiffs' complaint* also), and where defendant's evidence supplies or may supply the deficiency in plaintiffs' evidence.

SECTION 513. Under the Nevada state statute, which the federal court in that state will follow in actions at law, (under U. S. Rev. St. Sec. 914), the insufficiency of a complaint to state a cause of action is a radical ground

of objection which is not waived by failure to demur, or other defect of procedure, but may be raised always or at any time, by motion for non-suit, exception to verdict or judgment, motion to peremptorily instruct, motion for new trial, or even for the first time on appeal or writ of error. This is the rule in all the code states having statutes similar to that in Nevada.

"Sec. 98. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant or the subject of the action.

(2, 3, 4, 5, 7, immaterial here.)

6. That the complaint does not state facts sufficient to constitute a cause of action."

Nev. Rev. Laws 1912, Section 5040.

"Sec. 102. When any of the matters enumerated in Sec. 98 do not appear on the face of the complaint, the objection may be taken by answer."

Id. Sec. 5044.

"Sec. 103. If no such objection is taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

Id. Sec. 5045.

But we raised this objection at every step during the trial, not only by objection to any evidence by plaintiffs, but by motion for nonsuit, exceptions to the verdicts and judgment; motion to peremptorily instruct the jury for defendant (going to plaintiffs' evidence and all the evidence); and motion for new trial.

SECTION 514. But even in those cases which hold that error in overruling nonsuit does not lie where defendant proceeds and put in his evidence, it appears to be so considered upon the ground that the defendant by offering evidence may sometimes supply the material evidence omitted by the plaintiff in chief; and if so, he should not then complain that the same evidence was omitted to be furnished by the plaintiff himself.

Boght vs. Gassert, 149 U. S. 17-23; 37 L. Ed. 631.

The effort seems to be to get down to a basis of abstract justice and to deny nonsuit where the grounds of relief consist not merely in the fact that a given fact is *not true or proved* but that it was *not proved by the plaintiff*. If it be true, (as shown by a defendant's own proof), the truth shall rule the decision no matter by whom proved,—is the substance of the courts' rulings on the subject.

SECTION 515. We are not disposed to cavil at the soundness or the substantial justice of this rule. If it

were applied in all courts everywhere greater justice would result.

But we do not find that this rule has been applied anywhere, when the defendant has not in fact supplied any missing link in the plaintiffs' evidence, either by plea or proof—and where the plaintiffs have not only failed to prove some fact essential to their success, but have proven matters of fact which are absolutely hostile to and a bar to their success. As where the plaintiffs themselves by evidence and testimony show the untruth of some ground of recovery relied upon by them and thereby disprove instead of proving their averments.

SECTION 516. That happens in this case. They have by their own documentary and oral testimony shown that they have not the title or right of action alleged by them concerning the pretended junior mining location on which they rely for judgment and possession of the ground. (Chap. II.) By like testimony and evidence they have shown that the ground was not at the time of the junior location vacant, unoccupied or unappropriated public land of the United States on which they were authorized to file a mining location. By the same token they have shown that they have not been ousted or dispossessed, illegally or otherwise, by defendant. They have tendered no issues as to invalidity, and have proved none, but have affirmatively proved that there are lodes and veins in the ground, or physical occurences therein

which the law denominates as such, and on which a mineral discovery could have been made by the original locators, remote grantors of defendant below. Their effort to require commercial ore or values at the surface, or at any particular point at or near the surface of the ground, is unavailing and rejected in law. They have testified that the physical occurrences or indications which they saw, and on which they assume to base an opinion, are not the same as those seen or observed by the locators, and on which the locators based their judgment and exercised their degree of prudence in locating. The physical conditions testified to by plaintiffs are consistent with locatability of the ground in years past, whether such testimony be considered alone or in connection with the testimony of defendant's witnesses which is consistent therewith.

SECTION 517. And with regard to the rule itself, like all rules, it has its qualifications. Instead of overruling on that ground alone exceptions to refusals to order a non-suit the U. S. Supreme Court has more than once considered and determined questions of law arising upon the decision of such refused non-suits.

Cent. Transp. Co. vs. Pullman Pal. Car Co.,
139 U. S. 24-39; 35 L. Ed. 55.

The difference between a motion for non-suit and one for a directed verdict is matter of form rather than sub-

stance, except that one permits a new suit if granted while the other does not.

Id., and Oscanyan vs. Arms Co., 103 U. S. 261-4; 26 L. Ed. 539.

Whether a defendant at law may present in one form or the other, or by demurrer to the evidence, the defense that the plaintiff upon his own case shows no cause of action, is a question of *pleadings, practice, forms and mode of proceedings* as to which the courts of the United States are now required by the act of Congress of June 1, 1872 (U. S. Rev. St. Sec. 914) to conform as near as may be to those existing in the courts of the state within which the trial is had.

Transp. Co. vs. Pullman &c., supra.

In Ry. Co. vs. Kelly, 187 Fed. 937 and U. S. vs. Transp. Line, 185 Fed. 486, there were compulsory non-suits which were sustained upon writ of error to the Third Circuit Court of Appeals.

SECTION 518. The rule now established in the Federal courts is this:

"If the state law permit a non-suit where the evidence with all the inferences to be drawn therefrom would not sustain a verdict, the Federal Court may do likewise under the provisions of Section 914, U. S. Rev. Stats."

Meehan vs. Valentine, 145 U. S. 618; 36 L. Ed. 839;

Cent. Transp. Co. vs. Pullman Pal. Car Co., 139 U. S. 24, 39-40; 35 L. Ed. 55;

Coughran vs. Bigelow, 164 U. S. 308; 41 L. Ed. 446.

In Coughran vs. Bigelow, supra, the Court held:

"It has long been the doctrine of this Court that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any evidence upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed, and that if the proof be not sufficient to warrant a recovery, it is the duty of the Court to instruct the jury accordingly; and if the jury disregard such instruction to set aside the verdict."

And also:

"The difference between a motion to order a nonsuit of the plaintiff, and a motion to direct a verdict for the defendant, is rather a matter of form than of substance." Citing with approval Centrans Transp. Co. vs. Pullman &c. Co. supra.

The rule as to nonsuit prescribed by the Nevada Code of Procedure, Section 5237 Rev. Laws 1912, is as follows:

Sec. 295. An action may be dismissed or a judgment of nonsuit entered in the following cases.

Paragraphs 1, 2, 3, 4, immaterial here.

5. By the court upon motion of the defendant when the plaintiff fails to prove a sufficient case for the court or jury.

This statute is in affirmance of the common law.

Laird vs. Morris, 23 Nev. 34; 42 Pac. 11.

SECTION 519. The question presented on a motion for non-suit is a question of law depending upon whether there is any evidence to support a judgment for plaintiff, and may be raised either on motion for new trial or on appeal from the judgment.

R. R. Co. vs. Fellenbaum, 32 Nev. 278; 107 Pac. 882.

A state statute (as to nonsuits) does not relate merely to the conduct and administration of the judge but confers a substantial right, and prescribes a *practice and mode of proceeding* which, under the Federal statute, is binding on the courts of the United States sitting within that state.

This view seems especially appropriate to a case where, as here, the plaintiff brought his suit in the state court, whence it was removed.

Fries-Breslin Co. vs. Bergen, 168 Fed. 360.

....*SECTION* 520. *Relief Asked.* For the error in refusing an order of non-suit at the close of plaintiffs' case

in chief both for insufficiency of the complaint, and also for insufficiency of the evidence, the judgment below should be reversed.

We, however, presented the same challenge to the whole evidence that we did by motion for nonsuit to the plaintiffs' evidence, and that is elsewhere herein discussed.

CHAPTER XII.

ERRORS IN ADMITTING TESTIMONY FOR PLAINTIFFS.

Section

(A) As to Mineral or Mineralized Conditions.....521
(B) As to Location of the Guy Davis relocation..521a
(C) As to the Adverses.....522
(D) Deed without Reverse Stamps.....523
(E) Relief Asked 525

SECTION 521. (A) *As to Lodes or Veins.* Under assignments of error Nos. 7 to 16, inclusive, we complain of the admission of testimony that they saw or found no lodes or veins on the Salt Lake No. 3 in fall of 1913, nearly seventeen years after their location. The law and principals which condemn this character of testimony and their supposed samples, is set out and discussed in Secs. 68-85, 333-348, 486-490, and throughout Chapter X hereof. So far as their testimony and samples show actual mineral values, or actual walls of country rock with enclosed vein filling material of different character, etc., it is competent because self-deserving, but none of it warrants a judgment in their favor or against us.

SECTION 521a. (B.) *Guy Davis Relocation.* Assignments Nos. 2 to 6, inclusive, are based upon rulings of the court in admitting testimony by witnesses for the

plaintiffs, and permitting questions to be answered, importing they had entered upon the ground in controversy and had made thereon the Guy Davis relocation, without any evidence or proof that said ground was at the time thereof vacant, unoccupied and unappropriated public land of the United States, open and subject to mining location under the laws of Congress. Objection was made to said questions and evidence preliminarily, and repeated until it was ruled that said objection would go to all that class of testimony. The court ruled the objection well taken, but he would allow plaintiff to put in their proof in their own way. (Record pp. 227.)

The grounds of these objections are covered in Secs. 167-168, 207, 272-306a.

SECTION 522. (C.) *The Land Office Adverses.* Under assignments 17 and 18 we complain of the admission in evidence of alleged adverses filed by or on behalf of George B. Thatcher, Guy Davis and Noah Faubert. The complaints both in this case and the other tried with it, are parallel, and allege that *defendant* had filed an adverse. (Record pp. 439-43.) When objection was made, they asked and obtained leave to amend one complaint by substituting "*plaintiffs.*" Record pp. 440-443. We do not know as yet in which case they desired to amend, as the complaint has not been amended in either case.

But as seen in Chapter II, neither of the above parties are proper parties, or have any interest in the

alleged Davis relocation in support of which the supposed adverses were filed, and they have no cause of action herein. Wherefore the adverse was also immaterial.

(C) DEED WITHOUT U. S. REVENUE STAMPS ATTACHED.

SECTION 523. Under assignment of Error No. 19 we complain of the admission in evidence of a deed offered by plaintiffs from defendant in error George B. Thatcher to defendant in error J. J. Healey for a one-tenth interest in the alleged Guy Davis location, because of the absence of U. S. Revenue Stamps. Record pp. 501, 532, 533. As at first offered the deed had no stamps attached, and when objected to, the plaintiffs' counsel himself obtained, attached and cancelled TEN CENTS in U. S. Revenue Stamps. This was an insufficient amount of stamps, and they were not attached or cancelled, nor was the validation transacted as provided by the Act of Congress effective December 1, 1914, known as the War Revenue Act.

Schedule A of the Act provides:

"*Conveyance:* Deed, instrument of writing, whereby any lands, tenement or other realty sold shall be granted, assigned, transferred, etc. * * * When the consideration or *value* of the property conveyed exceeds

$100 and does not exceed $500, 50 cents; and for each additional $500, 50 cents. * * *"

And another provision of the Act requires that whenever the stamp required is not attached at the time, it can only be validated by taking the deed to a U. S. Revenue Collector, and doing certain things. But since the required amount was not attached *at all,* but only 10 cents, we need not go further. It has not been either properly stamped or properly validated. See record of deed at Record pp. 535-536.

SECTION 524. And yet at Record p. 340 their witness Phillips testified that the value of the Homestake and the Guy Davis locations (the conflicting locations claimed by them) was $100,000. This should have required $50.00 stamps for the two deeds, Exhibits A-5 and A-6, which were objected to and admitted with only ten cents stamps on them.

SECTION 525. *Results.* It follows from the foregoing that it was reversible error to admit either of the three classes or items of evidence to which attention has been called in this chapter, and were there no other errors in the case, it would be the duty of the Court to reverse the judgment and send the case back for a new trial.

For the reasons stated in this chapter, the judgment below should be reversed.

CHAPTER XIII.

ERROR IN REFUSING PROPER CROSS-EXAMINATION BY DEFENDANT OF PLAINTILFFS' WITNESSES.

Section.

(A) As to witness Phillips.....526
(B) Citation of authorities on right of c.....531-540
(C) Burden of Issue and Proof.....541
(D) Rulings of the Court.....542, 553, 557, 559
(E) Evidence of discovery by proof of present existence of veins and lodes.....548
Evidence of other veins and lodes in vicinity..549
(F) Error and injury 550
(G) Relief 562

SECTION 526. . *As to witness Phillips.* This chapter relates to our Assignments of Error Nos. 22 to 26 inclusive.

The plaintiffs' witness Robert L. Phillips testified in chief (Record p. 504) that he had within the last few weeks *been over the ground* within the Salt Lake No. 3, Midas and Evening Star lode mining claims, and taken twelve samples. Of what material were these samples, how or where taken was not stated, except in the most scant and general terms as to the vicinity where taken; i. e., *at* or *in* a certain cut, shaft, tunnel or opening, but

not whether taken within the lode or vein therein. That he turned these samples over to their attorney, Mr. Thatcher, who is supposed to have had them assayed. The assay certificates were put in evidence, or some of them, and some were withheld. Some of the certificates put in evidence showed values of "Trace," and one of them showed assay values and mineralization. Of the twelve samples so taken, he testified that his samples:

Nos. 1 to 5 were taken from Salt Lake No. 3 ground, viz.:

No. 1 (two samples) came out of Shaft No. 1 above the wagon road;

No. 2 (two samples) taken just above the road southeast of shaft;

No. 3 (one sample) from a cut marked "2" on the map;

No. 4 (one sample) from a cut marked "3" on the map;

No. 5 (one sample) from a cut marked "4" on the map.

Nos. 6 to 8 were taken from Midas ground, viz.:

No. 6 taken in the shaft marked "21" on the map;

No. 7 taken from the tunnel marked "22" on the map;

No. 8 taken from the cut marked "23" on the map.

Nos. 9 and 10 were taken from Evening Star ground, viz.:

No. 9 was taken from cut "20" on the map;

No. 10 *at* cut "24" on the map.

(Record pp. 505-506.)

Nos. 11 and 12 were not accounted for, nor from where taken, or anything about them.

SECTION 527. Plaintiffs then introduced in evidence as part of the testimony and examination of Phillips, a portion only of the assay certificates of the above samples, viz., those of:

Sample No. 2 (two samples) showing values of "trace" and 63 cents respectively in gold and silver. (Record pp. 507, 509, 510.)

Sample No. 5 (one sample) subsequently withdrawn and the values do not appear in evidence. (Record pp. 506, 512.)

Sample No. 6 (one sample) showing "trace."

Sample No. 7 (one sample) showing "trace."

Sample No. 9 (one sample) showing "trace."

Sample No. 10 (one sample) showing "trace."

(Record pp. 506, 509.)

And omitting from the evidence the samples Nos. 1, 3, 4, 5, 8, 11 and 12 so taken. Or out of a total of fourteen separate samples taken, six samples were put in evidence, and eight samples left out. One of these, No. 5, was put in, but struck out by consent.

The witness Phillips was then turned over for cross-examination.

SECTION 528. The manifest purpose and intention

of the foregoing testimony and assay certificates was, of course, in the direction of trying to prove that there were no veins or lodes of mineral-bearing rock or ore on the lode claims. We continue in limine, the previous objections that this subject was not within the issue raised by the pleadings, as a ground of supposed invalidity of the lode claims, also that the plaintiffs had no title or interest in the conflicting Guy Davis relocation.

That all such inquiry is barred by limitations under Chapter III hereof; and other objections to plaintiffs' status upon the complaint and proofs to enter upon this question.

And the further point as to the samples being merely taken at or within a certain cut or tunnel without showing it was also taken in each instance from the vein matter, or between the walls of a fissure.

But inasmuch as the purpose and intent of the testimony was to draw inferences adverse to the vein and lode character of the ground, because the particular samples they took and put in evidence were not for the most part mineralized, defendant was clearly entitled to cross-examine him not only as to each sample taken of which they put the assay in evidence, but also as to those other samples which they took but of which they held back both the sample and the assay from the evidence.

SECTION 529. The defendant therefore asked Phillips this question on cross-examination:

"Now, of the samples that are not in evidence, were there any that returned values in assaying?"

To this question plaintiffs' counsel made the objection and the Court made the ruling which is contained within Assignment of Error No. 22. Counsel's objection, which was sustained by the Court, was:

1. That they had not asked their witness anything about the values of the omitted samples, but merely that he did take them;

2. Unless it be shown that the cuts and excavations from which the omitted samples were taken were on the ground and excavated at the time of the location of the Homestake—Salt Lake No. 3—claim (meaning, we presume, at the time of the Davis and Homestake locations).

This was error in both particulars.

SECTION 530. *Right of Cross-Examination.* It is evident as we said before, that their purpose was to prove, or rather to have the jury conclude, that there were no veins or lodes in this ground, on which a mineral discovery might have been based when the claim was located in February, 1897. Anything less than this would be short of the mark. By proving that they took a sample *from* or *at* a given cut or opening on the ground, which yielded no assay values, they sought to have the jury infer or conclude that all the rock or material throughout the lode claims was likewise valueless and of the same cloth or material as the samples they

took and assayed. This conclusion or inference is itself a legal fallacy, and a false conclusion in mining as well as law. (Secs. 389-407, ante.) Yet it represents the trail over which their reasoning traveled, and on the theory of which they asked and obtained the jury's verdict. It is the fabric on which their judgment stands. Each time their counsel and witness opened their mouths to tell the jury that this or that sample was barren of values, it was an attempt to have the jury believe or understand and conclude that there were no better samples on or under the surface of the ground, and it constituted an extension of their sworn testimony to include these resulting facts or inferences for which they contended. It was in law, as against themselves and for the purpose of cross-examination, testimony that there were no greater assay values than "trace" to be obtained anywhere on these lode claims, upon or under the surface.

SECTION 531. Now, if as a matter of fact there were other parts of the ground, and other samples obtainable, or that had been obtained by Phillips himself, that yielded a better assay than "trace," or showed substantial values, and which would therefore show that the ground was not barren throughout, but that the samples actually taken and put in evidence were either by accident or design, not fairly representative of the character of the ground, as shown by other samples taken

by the witness which yielded values, then that is proper cross-examination.

"Cross-examination is not limited to the very day or the exact facts stated in the direct examination."

8 Enc. Pl. & Pr., 105, note 2, citing cases.

"It is competent on cross-examination to call out not only any fact contradicting or qualifying any particular facts stated on the direct examination, but also tending to rebut or modify any conclusion or inference resulting from the facts so stated."

Wilson vs. Wagar, 26 Mich. 452.

N. Y. Iron Mine vs. Neguanee Bank, 39 Mich. 644-660.

40 Cyc. 2482-2483, citing many cases.

SECTION. 532. "Cross-examination would be a mere farce, if the cross-examiner could not be allowed to show by it just what the whole transaction was so far as it might be within the knowledge of the witness."

Wilson vs. Wagar, 26 Mich. 452-457, citing:

Thompson vs. Richards, 14 Mich. 172.

Chandler vs. Allison, 10 Mich. 460.

Turner vs. City, 20 Mich. 390.

"A cross-examiner has a right to draw out anything which will contradict, weaken or modify the evidence given by the witness on his direct examination, and to test his credibility."

Thompson vs. Richards, supra.

Under the American rule the cross-examination may extend to other matters which limit, qualify or explain the facts stated on the direct examination, or modify the inferences deducible therefrom, provided only that such matters are directly connected with the facts testified to in chief.

8 Enc. Pl. & Pr., 105, note 2, citing:
Blake vs. Powell, 26 Kan. 326.
Haynes vs. Leadyard, 33 Mich. 319.
Callison vs. Smith, 20 Kan. 326.
Langworth vs. Green Co., 88 Mich. 207.
Thomas vs. Miller, 151 Pa. St. 482.
Mayer vs. People, 80 N. Y. 364.
Baird vs. Daley, 68 N. Y. 547.

SECTION 533. Thus where a witness in his direct testimony gives only a portion of a material transaction or conversation, it is the right of the party against whom he testifies to cross-examine him in detail concerning the omitted portion.

8 Enc. Pl. & Pr. 105, note 3, citing:
Perdue vs. R. R. Co., 100 Ala. 535.
People vs. Dixon, 94 Cal. 255; 29 Pac. 504.
Watrous vs. Cunningham, 71 Cal. 30; 11 Pac. 811.
Patrick vs. Crowe, 15 Colo. 543; 25 Pac. 985.
Black vs. Wabash R. Co., 111 Ill. 351.
Carey vs. Richmond, 92 Ind. 259.

Vogel vs. Harris, 112 Ind. 494.
Aulls vs. Young, 98 Mich. 231.
State vs. Adams, 108 Mo. 208.
Kircher vs. Laughlin, 28 Pac. Rep. 505.
Murray vs. Great Western Ins. Co., 72 Hun. (N. Y.) 282.
Clapper vs. Waterfor, 62 Hun. (N. Y.) 170.
Redman vs. Haberstro, 1 N. Y. Supp. 561.
Ah Doon vs. Smith, 25 Ore. 89; 34 Pac. 1093.
Sayres vs. Allen, 25 Ore. 211; 35 Pac. 254.
Labbe vs. Corbett, 6. S. W. Rep. 812.
Yarborough vs. Davis, 15 S. W. 713.
Currier vs. Robinson, 61 Vt. 196.
Weadock vs. Kennedy, 80 Wis. 449.

"The benefits of cross-examination may be, and must be, altogether nullified if such questions must be rejected, because that precise subject was not called to the attention of the witness by the party who called him."

Haynes vs. Ledyard, 33 Mich. 319-321.
Chandler vs. Allison, 10 Mich. 477.
Thompson vs. Richards, 14 Mich. 172.

"There could be no such a thing as cross-examination if such a course were allowed. No one could expose a fraudulent witness for his own dishonest concealments; and every one who knew of such practices would be

driven to the necessity of calling, in his own behalf, an adverse witness, to show his own concealments, whom if perjured, he could not impeach. The absurdity of such a process is too plain to need pointing out.

"No one can be compelled to make an adversary's witness his own to explain or fill up a transaction he has partially explained already.

"The Court erred in refusing to permit these questions to be put to the witness."

SECTION 534. "Whenever an entire transaction is in issue evidence which conceals a part of it is defective and does not comply with the primary obligation of the oath, which is designed to elicit the whole truth.

"If the witness were, as he always may be, requested to state what he knows about it, he would not do his duty by designedly stopping short of it. Any question which fills up the omission, whether designed or accidental, is legitimate and proper on cross-examination.

"When the answers are given, the nature and extent of the transaction becomes known from a comparison of the whole, and each fact material to a comprehension of the rest is equally important and pertinent.

Chandler vs. Allison, 10 Mich 477.

"A party cannot glean out certain facts, which alone would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected.

Chandler vs. Allison, supra.

SECTION 535. "A defendant, on cross-examination of a witness for the plaintiff has a right to put any question calculated not only to test his credibility and the extent and means of his knowledge, but to draw out any one of the particular statements made by the witness, or to weaken any inference from the whole or any part of his testimony in chief in support of either of the main facts essential to the plaintiff's case."

O'Donnell vs. Segar, 25 Mich. 367.

Litchtenberg vs. Mair, 43 Mich. 388.

SECTION 536. "When a party places a witness upon the stand to testify to facts which tend to support his side of the issue involved and questions him concerning such facts, it is the right of the opposite party, on cross-examination, to go as fully into the subject as may be necessary to draw from the witness all he may know concerning the transaction about which he has testified, and to put before the jury any pertinent facts which will have a tendency to controvert the testimony which has been given by the witness in favor of the party calling him. A more restricted rule renders cross-examination nearly valueless and prompts the party putting questions to his witness to give to the jury a one-sided and partial view of the facts within the knowledge of the witness and to preclude the opposite party from supplementing the statement with any further facts within his knowl-

edge concerning the same transaction, unless he shall make the witness his own, in which case he is supposed to vouch for him as credible.

R. R. Co. vs. Van Steinberg, 17 Mich. 99.

SECTION 537. In Gilmer vs. Higley, 110 U. S. 47, 28 L. Ed. 62, which was an action by a passenger against a common carrier for damages for personal injuries, the plaintiff testified in his own behalf to his becoming a passenger and entering the conveyance. On cross-examination he was asked whether his fare was demanded before the accident and whether he had not refused to pay, and was ordered to leave the coach when requested to do so. These cross questions were objected to and excluded as not proper cross-examination.

This was overruled by the Supreme Court of the United States, which held as follows:

"To permit a party to the suit to tell his own tale of a transaction like this and to conceal what is important to the defendant in regard to the same occurrence, and at the same time would be a gross perversion of justice, and would bring into discredit the policy of permitting parties to actions to testify in their own behalf."

Incidental and collateral matters may be drawn out on cross-examination to test the temper and credibility of the witness.

11 Ency. of U. S. Reports, pp. 1106, note 21.

SECTION 538. In Mine vs. Bank, 39 Mich. 644,

657-8, the Court, in speaking of how a certain willing witness was handled by counsel, say:

"Here was the principal actor in the transaction under investigation * * * carefully examined in such a manner as to avoid having him utter a single word regarding the main fact, though it was peculiarly within his knowledge.

"In that manner he was made to conceal not merely a part of the transaction, but the principal part, and made to tell not the whole truth, according to the obligation of his oath, but a small fraction of the truth only; a fraction, too, that was important only as it bore upon the main fact which was so carefully kept out of sight while their witness was giving his evidence."

"It is true defendant was at liberty to call the witness subsequently, but he was not compellable to do this and thus give credit to plaintiff's witness."

"One of the mischiefs in People vs. Barton was that it encouraged a practice not favorable to justice, whereby a party was compelled to make an unfriendly witness his own, after the party calling him had managed to present a *one-sided and essentially false account* of the facts by artfully aiding the witness to give such glimpses of the truth only as would favor his own side of the issue."

"What we have said on this point has in substance been said many times before." Citing:

Haynes vs. Ledyard, 33 Mich. 319.

Wilson vs. Wagar, 26 Mich. 452.
Hamilton vs. People, 29 Mich. 175.
Campaue vs. Traub, 27 Mich. 215.
O'Donnell vs. Segar, 25 Mich. 367.
R. R. Co. vs. Van Steinburg, 17 Mich. 99.
Thompson vs. Richards, 14 Mich. 172.
Denn vs. Dudney, 13 Mich. 239.

SECTION 539. "The testimony elicited by a legitimate cross-examination of the witness constitutes a part of the evidence given in chief, and both alike are to be treated as evidence given on the part of the party calling the witness."

Wilson vs. Wagar, 26 Mich. 452.

A party is not obliged to give credit to a hostile witness called by the opposing party.

8 Ency. Pl. & Pr., page 104.

SECTION 540. It is evident that plaintiffs' counsel was "mixed" as to whose witness was on the stand, and who it was (as between plaintiffs and defendant) that was then engaged in trying to show or prove anything by the witness. It was plaintiffs' time at the bat, not defendant's, and it was their witness testifying, not ours. If any preliminary showing was due, it was due from them, not from us. They were trying to prove no former mineral discovery in either the Salt Lake No. 3, Midas or the Evening Star before they sougth to locate the Davis and the Homestake on the same ground. And

they had decided that in their opinions the equivalent of this would be to prove general barrenness of the rock and formation or material throughout these mining claims at the surface by means of testimony that it was barren at two or three points selected by themselves on each claim. Good or bad, this was their program. Now if, in taking these two or three samples, they accidentally obtained assay values that will disprove their own theory regarding lode values, what is the result? Can they, by suppressing a portion of their own returns and putting in only the barren returns, make out their case of general barrenness throughout? It would be equivalent to the witness testifying he holds in hand only $20 gold coins, and opening one hand to prove it, but refusing to open the other hand, and denying the right of the cross-examiner to request that he do so, on the ground that he had said nothing about that hand.

SECTION 541. (C) *Burden of Proof.* Recurring now to proposition 2 in counsel's objection (Section 529 ante):

"• • • unless it be shown that the cuts or excavations where taken were on the ground at the time of the location of the Homestake—Salt Lake No. 3" (meaning, perhaps, at the time of the Guy Davis relocation) it is evident that counsel was further "mixed" about the burden of the issue or proof as to mineralization or non-mineralization of the ground. This burden, to go for-

ward, was on the plaintiffs, as we showed in Sections 191-199, 203-206, 349-362 of this brief. Defendant did not have to show anything at all, in limine, regarding mineralization or prior discovery. He had acquired these locations in reliance on the records and with more than two years' possession and working by the owners to their credit. The locations were sustained both by rebuttable and irrebuttable presumptions of regularity and validity. (Sections 195-199, 203-206, 349-362 ante.) The location certificates alone imputed mineral discovery (Sections 195-197, ante), and if adverse possession were not in the way, must be met by both allegation and proof to the contrary. The plaintiffs had elected to ignore the irrebuttable presumptions, and to omit allegation of any invalidating facts from their complaints challenging rebuttable ones, but were undertaking in their testimony to deal with such presumptions as might be considered rebuttable. To undertake this is to confess the obligation, the necessity, the burden for them to do so, in order to succeed. Otherwise, they would need only sit down until defendant should in the course of his defense, put in some proof of the facts as to the original mineral discoveries. They did not await our defense, for they knew by this time that they could not do so. Yet they interpose an objection to our cross-examination, the implication of which is that it is upon the defendant to make affirmative proof of mineral discovery, rather

than upon the plaintiffs to do that which they had set out to do, viz.: disprove mineralization or prior mineral discovery. Not only so, but that we cannot cross-examine their witness Phillips while testifying in chief upon this matter, until we shall have first in advance of the opening of our defense, and in advance of any opportunity to do so, discharged in fact that burden by showing the particulars of mineralization and discovery, and the time and place thereof affirmatively. If a more impossible and self-contradictory objection was ever made, we do not know when it happened. (Cases Section 548, post.)

SECTION 542. Yet that the Honorable District Court was itself misled by the objection, and confused in its understanding of the law, is shown by the ruling which followed sustaining the objection:

"THE COURT: I do not think a discovery which was made on the ground subsequent to a valid location made by the plaintiffs can be of any value to you. In other words, if last week you went upon that ground and discovered ore worth $1,000 a ton, I don't believe it would do you any good, if the plaintiffs made a valid discovery and location before you made this shaft.

"It is not a question whether there was mineral in the ground. The question is whether there was a discovery made, and if you discover anything there, no matter how rich, after a valid discovery and location by

others, it does not avail you. For that reason I think the objection is well taken.

"I will allow you at the present time to question the witness as to any samples that were taken by him from openings in existence or from exposures that were in existence at the time these locations were made."

Defendants except to the ruling of the court. (Record, p. 511.)

SECTION 543. The first vice of this ruling is that it rests upon the arbitrary assumption that "*a valid location*" has been made by the plaintiffs, as though it were a conceded or established fact in the case. The plaintiff in error, as defendant below, who was the only person to be affected by the assumption, never had conceded it. He had denied it in his answer and he had set up facts which, if true, made a *valid location* by plaintiffs impossible. He was there to dispute it with evidence at the trial. His turn had not come to do so, for plaintiffs were still testifying in chief. Meanwhile the law's presumption was that the older location was good, and the junior bad, and this presumption went with defendant through the trial like the law's presumption of innocence in a criminal trial. But the court arbitrarily presumed that plaintiffs' junior location was valid, and as a consequence that defendant's senior location was invalid, and based his ruling upon that assumption, while plaintiffs were in the very act of trying by evidence in chief to

disprove the prior presumptively legal and valid location.

On the other hand, the plaintiffs had then already put in their deeds and documentary proofs which showed affirmatively that they had no interest, title or claim whatever in the alleged Homestake or Davis locations. So that the only assumption that could lawfully have been made by the court at that time was that defendant's location was valid, and that plaintiffs had no locations at all, but that the Homestake and Davis locations were invalid, because made upon the improved, occupied and appropriated ground of another.

SECTION 544. Independent of that, the plaintiffs were just then engaged in an effort to invalidate by proof without allegation the defendant's senior location of the ground. Until they did this, completed proving it, and perhaps until they got a court or jury finding to that effect, there could be no possible validity to a junior location, and any assumption to the contrary was unlawful. It is the very heart of the dispute, with the presumptions in favor of the validity of the senior and invalidity of the junior locations, and with the burden against the plaintiffs. While they were engaged in the effort to discharge this burden, the defendant was entitled to sit by and cross-examine their witnesses thoroughly and all the answers given upon such cross-examination are plaintiffs' testimony, not defendant's, as per

decisions already cited in this chapter. And our right extends to every resulting fact or inference arising or contended for upon the testimony in chief. And as they contend that because certain samples or points on the ground are not mineralized, therefore the ground generally is barren, we are entitled to ask them if they did not take some samples which yielded values contrary to their contention.

SECTION 545. The defendant at the time of this ruling had still to be heard from on whether the ground was mineralized (so far as that bore on the subject of origial mineral discoveries), to which plaintiffs' testimony had been and was then being offered. Defendant had still to be heard from whether his rights to the ground were protected and secure under U. S. Rev. Stat. Sec. 2332, as pleaded by him. Yet the Court necessarily assumed by its ruling that defendant could not establish his title under this statute when his defense was reached. Yet the record shows he did do it when his time came, and did it incontestably and without dispute as to the facts by plaintiffs.

SECTION 546. But the Court went further and held that the question *was not whether there was mineral in the ground,* but whether we had discovered it. We assume the Court meant to say "whether we or our grantors had discovered it," since we had nothing to do with the original location of the ground. With this

amendment, the Court may have been correct. But why, then, had plaintiffs been permitted to take up the entire time of the trial to the time of the ruling, in attempting to prove that *there was no mineral in the ground* by means of proof or testimony that there was no mineral *at specified points* in or on the surface of the ground? Why were they encouraged to do so at the time by the ruling itself, and thereafter, by putting in samples or assays taken from two or three points on the ground, if not for the purpose of showing that *there was no mineral in any of the ground* upon which a prior discovery could have been made. They did not attempt to show that the exact points from which they took their samples were either of them the precise points where the original mineral discoveries were made or claimed to have been made when the claims were located. But their whole position was that there could have been no discovery, because the whole ground was barren, or without mineral; and that the whole ground was barren because it was barren at two or three points only on each claim where they took samples.

SECTION 547. Now if the Court had applied its ruling, consistently, that *the question was not whether there was mineral in the ground,* we might perhaps have had no objection, for it would have cut the plaintiffs' jugular, so far as all their testimony offered to invalidate is concerned (for their testimony was directed to

mineralization or values, not to discovery); whereas defendant stood protected by the irrefutable presumptions of validity (which includes discovery) attending possession and working for two years under the federal and state statutes. But whether the question was as the Court said or not, the plaintiffs were testifying along that line, and were given a verdict and judgment on it, and we should have been allowed to cross-examine by the same measure.

(E) EVIDENCE OF DISCOVERY BY PROOF OF PRESENT EXISTENCE OF VEINS.

SECTION 548. Furthermore, regardless of whose witness it was who was testifying at the time, the question of the existence today of a lode or vein of mineral-bearing rock in the ground is pertinent and competent testimony and elemental in the question of prior discovery, since veins do not grow up and become mineral-bearing in a day or a year. And proof that it exists now is proof that it existed when the claims were located, and together with the location certificate is proof of prior discovery.

Southern Cross Min. Co. vs. Mining Co., 15 Nev. 383.

Francoeuer vs. Newhouse, 43 Fed. 258, top of page.

Cheeseman vs. Hart, 42 Fed. 98.

Vogel vs. Warsing, 146 Fed. 950, citing cases.

Warsing vs. R. R. Co., 24 L. D. 172.

Jantzer vs. Copper Co., 20 Pac. 93.

"Where one miner has discovered what he considers mineral indications and deposits, and has staked the claim and done the discovery work, and another comes along and locates a part or all of the same ground, and goes into court to contest the senior location; and in order to sustain the contest shows the ground does in fact contain mineral deposits, and at the same time contends that the senior locator has not made a discovery, the courts will not examine the evidence of the senior locator with very great strictness."

Ambergris Mining Co. vs. Day, 85 Pac. 113-114.

These cases go to the very point about which objection to cross-examination was made; that is, as to whether there is in fact mineral in this ground, such as might have been discovered and legitimately located upon when the ground was taken.

SECTION 549. So far as the point made that the mineral exposure must relate to a given time or place, the contrary is true, and vein or lode exposures even in

adjoining claims are pertinent as evidence upon the mineral character of the ground in question.

Grand Central Mining Co. vs. Min. Co., 83 Pac. 648-9.

Ambergris Min. Co. vs. Day, 85 Pac. 109-11.

Lindey on Mines, Sec. 336, N. 51, citing 85 Pac. 109-11.

Erhart vs. Boaro, 113 U. S. 528; 28 L. Ed. 1113.

Harrington vs. Chambers, 1 Pac. 362; 111 U. S. 350; 28 L. Ed. 452.

Cascaden vs. Bartolis, 162 Fed. 267.

(F) ERROR AND INJURY.

SECTION 550. We need not cite authority to the familiar proposition that error is presumed from a denial of legitimate cross-examination of an opposing witness. But injury affirmatively appears from what followed. The court in its rulings gradually developed and extended the position first taken until it was announced that defendant had the burden of proving mineral discovery by his grantors, and that the testimony by which this must be done must relate to such conditions and mineral exposures as we might be able to prove existed

at some date prior to the attempted conflicting Homestake and Guy Davis locations respectively. And this was ruled during their case in chief, notwithstanding the case still stood upon the cross-examination of plaintiffs' own witnesses, who were upon the stand ostensibly for the purpose of discharging the burden which the law placed upon plaintiffs in attempting to disprove discovery or otherwise invalidate the prior lode location.

SECTION 551. Had the principle of this rule been applied to plaintiffs they would have been required to go back and show that the conditions, exposures, etc., at each point where they took a sample were the same as they existed in February, 1897, and March, 1907, respectively, at the times when our remote grantors' (the locators') rights first attached to the three lode claims in dispute in these two cases. But September, 1913, was adopted as the B. C. and A. D. of validity in both cases, so far as defendant's participation in the proceedings was concerned. All his questions were required to be shaped with reference to that date. But the plaintiffs were given rather more latitude.

SECTION 552. Going back to Phillips and his samples, where cross-examination was refused, he testified on record pp. 511-2 et seq., that some of the points where his samples were taken were not in the same condition as in September, 1913, and defendant moved to strike out the samples on the basis of the ruling the Court had

made (Record pp. 512, 515), but this was refused and plaintiffs allowed a good deal of latitude as we shall see. (Assignments of Error Nos. 24, 25 and 26. Secs. 651, 652, 653, post.)

SECTION 553. *Recurrence of Previous Ruling.*

Mr. Springmeyer: I take it that your Honor's ruling goes to the matter of the location of the placer claims, not necessarily to the beginning of this suit?

The Court: I think you had a right to make a discovery at any time before any subsequent rights intervened.

Mr. Springmeyer: The subsequent rights intervened when the placer claims were located?

The Court: A discovery made prior to the placer locations would certainly be work to your advantage.

Mr. Springmeyer If the work was done prior to the location of the placers, then your Honor's ruling is that the evidence is admissible; if since, it is not admissible?

The Court: That would be my idea about the matter. (Record pp. 512-513.)

(The witness having answered on cross-examination that some of the places where he took the samples were not in the same condition as at the time of the location of the placers, defendant asked to strike out the samples.) (Record p. 515.)

Mr. Thatcher: Don't be in too big a hurry. If you will ask a few more questions, you will find out.

The Court: I think you didn't continue to enumerate the certificates you offered in evidence, General Thatcher. I suggested a while ago you call off the numbers.

Mr. Thatcher complies, going from one to the other.

Finally defendant objects to the reiteration.

Mr. Thatcher: I want to show that he took them from the tunnel, and while there may have been some change in the condition of the tunnel, there has been no change in the point where he took them; that that point was exposed at the time of the former trial and all times during this proceeding.

The Court: Why, in order to save time, couldn't you go over that matter with him at recess, and then have him testify that he took the samples from certain ground that was exposed at the time?

Mr. Thatcher: That is satisfactory to me. (Record pp. 515-517.)

SECTION 554. *Mr. Springmeyer:* —on your Honor's ruling we will move to have all the evidence as to any values, particularly as to the assays, stricken out, because there has been no showing whatever that the condition was precisely the same at the time of the examination as at the time of the location of the placers. (Record p. 517.)

The Court: I didn't intend to make the ruling quite so broad as that. Suppose at the time the placer was located in shaft 21, for instance, there was a depth of 10 feet, and since that time we will assume that you have sunk that shaft to a depth of 40 feet. The first 10 feet were exposed at the time the placers were located. A sample taken within that 10 feet I think would be admissible because the ground was exposed. A sample taken from the bottom of the shaft was taken from ground which was not exposed at that time and it seems to me would be inadmissible. (Record p. 517.)

We submit that Mr. Springmeyer was right, and the court's remark an insufficient answer; for one reason because plaintiffs had given no testimony on which to base any such distinction, as made by the Court. On their testimony in chief it was not a question whether work at or within any cut, shaft or opening had progressed from 10 to 40 feet, or any other determinate amount since the time the pretended placer was located in September, 1913. Nor had the admissibility of their samples and assays already actually put in evidence been made to depend on any testimony as to whether the precise point or points at which taken was or was not an area of exposure in September, 1913. No such evidence was tendered in chief with the samples and assays. On cross-examination the witness said two or three times that some of the samples and assays in evidence were

from points not then exposed, but were from where subsequent work had been done. (Record pp. 513, 515, 518-519). Phillips was not even in Copper Canyon in September, 1913, so as to know what surfaces were or were not then exposed in the various cuts, shafts, etc. (Record pp. 522-523.) In answer to our repeated motions to strike out the samples and assays because not in accord with the ruling they had invoked against us, it was suggested that counsel better take the witness out and go over it with him at a recess of the court, and then have him come in and testify that he took them from certain ground exposed at the time. (Record p. 517.) This was said by plaintiffs to be satisfactory, and when he came back the witness in response to leading questions by his own counsel said, yes, he took those in evidence from the old points.

SECTION 555. But Phillips' previous testimony, and on which the samples were admitted in evidence, was simply that his samples were taken from *at* or *in* a given cut, shaft or opening (nothing being said as to extension or development since then), without any reference to an area of exposure thereof in September, 1913. Subsequent work was not inquired about, nor how much subsequent work (if any) stood with reference to the points where samples were taken. Their subsequent leading questions and cross-examination of their own witness (Record pp. 522-523) did not heal this deficiency

in chief, but was an ineffectual attempt to have their witness cover by conjecture what he had been unable to testify about his own knowledge owing to the fact that he had not come into the canyon so as to acquire any knowledge about the cuts and openings in question until two or three months after the time inquired about. (Record pp. 524-525.) But even if otherwise, a sample of material can be taken *at* or *in* an opening that existed in September, 1913, without either being within an *area of exposure* at that time, or yet within an area of *vein exposure* at that time, or at all. The court's illustration was therefore one which did not illustrate, so far as the evidence in this case was concerned.

SECTION 556. As we have shown elsewhere (Secs. 327-330, ante) they would not own to seeing a vein in the various cuts, shafts or openings at all, and the reason why they would not admit seeing the vein was that they saw nothing which would in their opinion yield commercial ore or returns at the surface. (Sec. 388, ante.) Having thus excused themselves from seeing the lodes or veins, they took samples merely *at* or *in* the given cut, shaft or opening indifferently and without any regard to areas *within the walls of the vein or veins*—not to speak of areas of exposure therein in September, 1913. If they took it from the country rock, it would be immaterial as to the depth or extent of the shafts, cuts and

openings thereabout, nor as to the areas therein exposed in September, 1913.

Not only so, but their witnesses had testified (Rec. p. 279-280, 303) that some of the shafts or openings had wash or dirt in the bottom, with sagebrush growing in it. These they did not excavate to see if there were mineral in the bottom, and so there was no fidelity to the principle of previous exposures, and their witnesses testified as to those nevertheless.

SECTION 557. *Mr. Springmeyer:* We are undoubtedly limited (by the Court's ruling) to proving there was a discovery of mineral in place on each of the lode claims prior to the location of the placer claims; but we say it is evidential of the fact that there was a prior discovery if we show that *at any time,* whether since or prior to the location of the placers, there has been mineral discovered. And we say, if your Honor rules that samples taken since the location of the placer claims is proof admissible to show there were no values and no mineral in place on the lode claims, then it would be admissible to show the contrary or opposite thereof.

The Court: (1) That question is not presented, because, as I understand General Thatcher's position, he don't intend to offer any assays *made in lode and vein formations,* or anything that is claimed to be such, that was not exposed prior to the time the placers were

located, and if he has put anything of that kind it has been matter of inadvertence.

(2) In your case, it is not for you to prove there is mineral in the ground. It is for you to prove that before the placers were located you had discovered mineral. And if the mineral was exposed at that time, we may safely presume if it was exposed in some of your workings, that you had discovered it.

(3) I think for the present I shall only admit assays to show lode values where the assays were taken. I don't care when they were taken; they may have been taken yesterday, for that matter. But they must have been taken from surfaces exposed prior to the time and at the time the placer locations were made. Now, is that clear?

Mr. Springmeyer: Yes, I understand your Honor's ruling. Of course, we take an exception to the ruling of the Court on the ground that it is proper cross-examination.

The Court: You have that exception in. Your question was as to whether he had any other samples. If he took any samples from the ground that was exposed, the ruling is that he must answer. If he took other samples from ground that was not exposed, my ruling is that he need not answer.

I don't think your question covered that, and when you go into it again, I think you had better ask a ques-

tion which will bring you strictly within or without the rule, as the case may be. (Record pp. 518-519.)

SECTION 558. As to Mr. Springmeyer's proposition 1 in the first quotation in the preceding section, we have only to cite the cases in Section 548, ante, especially Min. Co. vs. Min. Co., 15 Nev. 383.

The Court's reply and ruling is not an answer to the principle urged, no matter whether the samples were taken from surfaces exposed at a given time or not. The chief reason for this is, they were not shown to have been taken from within the walls of the vein or from presumptive or possible vein matter, or not to have been taken from mere country rock within the shafts and cuts, in which latter event they would have no reason to expect productive assays. And another reason is that, inasmuch as all true veins and lodes are not mineralized throughout, but have alternate rich and barren spots, and varying degrees of mineralization from point to point, the taking of a barren sample from one spot, whether within the vein itself or merely in the neighborhood of the vein, or *at* or *within* the same open cut or shaft in which the vein is exposed, is not evidence to prove that the vein does not exist. They are so often silent whether they saw the walls or not, we may not presume for them that their samples were taken from within those walls, but if we should so presume, that is not proof to show that the original locators did not obtain a better sample

at another point within the vein; nor that the formation was not such that a locator or miner could follow it reasonably expecting to find ore valuable enough to work. (Secs. 389-407, ante.)

(G) FURTHER PREJUDICIAL RULINGS

SECTION 559. The denial of proper [illegible] ination is not, however, the only prejudicial rulings of which we complain in these assignments. In the record excerpt just quoted, the court ruled that:

1. It is for you (defendant) to prove that before the placers were located you had discovered mineral.

2. Defendant must limit his questions as to mineralized conditions to such surfaces as he could prove existed and were exposed prior to the alleged placer locations, to-wit, in September, 1913. (Assignment No. 25, Sec. 652, post.)

Proposition 1 is contrary to law, and we have cited the authorities in Sections 191-199, 203-206, 349-362 hereof.

Proposition 2 is also incorrect. (See cases cited in Section 548 hereof.) Both of these burdens belonging to the plaintiffs, and they could not lawfully be placed upon the defendant. Least of all could defendant's

privilege of cross-examination be thus limited and hampered. But defendant was continuously hampered all through the subsequent trial by these rulings.

SECTION 560. On more than one hundred pages of the subsequent record, both on cross-examination of plaintiffs' witness, and on direct examination of his own witnesses, defendant was hampered and restricted in the form and frame of his questions, by the necessity to limit investigation to what could be shown to have been exposed and known at a given point prior to September, 1913. Instances of questions thus restricted and hampered appear on Record pages 513-4-5-6-7-8-9, 520-1-2-3-4, 753, 758-9, 761-2-4-5-6-8-9, 770-2-3-4-5-6, 785-6, 798, 801-2-3-4-8-9, 811-12-14-15-16-17-19, 820-21-22-24-25-26-28-29, 831-32-33-37-38, 842, 861-3, 893-4-5-6-7-8, 902-4-5-6-7, 911-15, 940, 957-8-9, 960-1-6-7-9, 970-1-2-3-8-9, 980-3-4-6-7, 993-4-9, 1132-3-4-5-6-7, 1051-2, 1120-1, 1139, 1140-1 of the record.

A lode or vein ever so wide and well developed, however richly mineralized, and however near the surface it extended, however thinly covered by the surface veneer of dirt and loose gravel or slide, could not be asked about without our being able to show it was plainly visible before September, 1913, and by limitation of our questions, call for that precise information. Much decisive information about these lodes and veins thus shut out became questions not permitted unless so warped

and shaped as to inquire only for the surface exposures then known, or which the witness might be able to testify was then or previously known by one of the previous owners of these lode claims. Yet there was no means of proving just precisely what was or was not known to any of the former owners at this, that, or the other place on the ground at any particular period of time, or just what the extent of excavation and vein exposure was in all these openings at a particular time in years gone by.

SECTION 561. Some of the instances and particulars of the operation of these rulings of the court, and their injurious consequences to the defendant, will appear in the next chapter hereof, devoted to the exclusion by the court of questions and testimony for defendant at the trial (Secs. 578-579, post), or such thereof as appears to relate to the ground involved in this case. But the rulings made during cross-examination of their witness Phillips were more injurious and far-reaching still. Because having been clearly announced and excepted to, they became the law of the case during the subsequent course of the trial, and the defendant could not ask questions of a witness which would clearly violate the court's rulings. The result was that much testimony as to veins and lodes in the ground, their width, strike, dip, included gangue or vein matter, mineralization, etc., was completely excluded in advance. Because some of it related to exposures at or under the surface

of the ground which had been opened since September, 1913, and since the attempted jumping of the ground by the Homestake and Guy Davis relocators; and some of it related to exposures which we did not know and could not prove whether they had been made or known at a given period of time or not.

The individual instances of the operation and enforcement of the rulings occurring during our defense were such usually as arose where it seemed questionable whether the testimony asked for was or was not covered by the court's rulings during cross-examination and of which we are now complaining. The court on such occasions developed and applied its previous rulings, but as to that large branch of our case clearly within the scope of the court's rulings, there was not any opportunity to ask questions during our defense, or at any subsequent time.

SECTION 562. Instances of the persevering effects of this ruling appears at sundry pages of the record, as before cited, but attention is called to Record pp. 761, 762, 815-822, 831-4, 892-906, 970, et seq. The witness Parker Liddell is a mining engineer and U. S. Deputy Mineral Surveyor who surveyed the Copper Canyon group of mines for patent in June and July, 1913. He spent about two months in all surveying the sixteen claims, beginning with the Midas, but did not then make any special examination as to mineral characteristics,

as that was before the jumping came up, and no trouble was expected. But on May 8, 1915, he went back there to examine as to veins and lodes (Record pp. 741, 753), and examined the ground generally and the cuts, shafts and openings. He found many veins and lodes about which he was prepared to testify, and did testify to a number of them as shown elsewhere herein. But those veins which he could not testify was known either to him on his previous visit while surveying or to the owners of the lode claims prior to September, 1913 (date of beginning of validity), he was not permitted to testify about.

SECTION 562a. Prorating this witness' time during the survey of sixteen claims in 1913 would only give him a few days on each claim, and doubtless most of this time was consumed in surveying on those claims furthest in the hills, and in going and coming, and making the field notes, transcribing and platting. And while he had some memory as to the different cuts, shafts and openings on the different claims, including those on the Salt Lake No. 3, Midas and Evening Star, he might not be expected to remember as definitely the depth, dimensions, extent of mineral exposures, etc., in all of the cuts, shafts and tunnels, and on the surface of the ground, as if his attention had been specially directed thereto at the time. Yet when on the witness stand he was suddenly confronted with the necessity to remember and fix in his

mind how much of each shaft or opening had been made at the time of his first visit prior to September, 1913, and what vein exposures were then showing therein, and how much of each was disclosed on his subsequent visit.

SECTION 562b. Not only so, but no allowance was made in the rulings, for such work as might have been done after Liddell was there surveying in June, 1913, and prior to September, 1913. Liddell could see the various workings on his first visit, and he could see that additional work had been done on most of them when he returned in May, 1915, but he could not know when the additional work had been done in each of the cuts, shafts and tunnels, after June and before September, 1913. Nor was there anything by which to fix exactly how much of the exposures appearing in May, 1915, he was entitled to testify about under the court's rulings. Unless a record is kept, it is not possible even for the men doing the work to remember just how much work was done, and to what extent, depth and dimensions as work proceeds at any given period of time, in each of the various excavations in these sixteen mining claims. Until the time of the trial it never was important for anyone to know, or remember, or preserve a record of these details, so as to give the exact date and progress of each step and rate of progress within each cut, shaft or tunnel, and when the ruling was made at the trial it was too late then to go back and try to obtain or formulate infor-

mation on these points, even if it were possible at all.

SECTION 562c. The same observations are true with reference to the testimony of Mr. Ralph, and he explained at Record p. 966 the difficulty of separating the impressions retained in his memory resulting from observations on one trip to Copper Canyon from Salt Lake City, from those received upon another and other trips, especially where the question related to minute details of what appeared in a given cut or opening at a particular period of time. In some instances he could be definite and clear, while in others he could not.

SECTION 562d. The witness B. F. Tibby first went to the canyon to examine and report on mineral conditions in February, 1915, when he spent four days there. He had never been out before, and could not attempt to report conditions as they were observed at any previous time. But he was equipped with abundant definite information as to the lodes and veins observed by him on that visit. He was not permitted to testify to much that he might have told without the restriction as to date of exposures, etc.

SECTION 562e. If it be always kept in mind on whom the law places the burden of the issue and proof as to invalidating facts, it is seen that it was upon the plaintiffs to *disprove mineral discovery* if that ground of attack was open to them under the pleadings. And part of this burden is that of showing the extent of the

exposures at each point they attempt to deal with in their testimony, up to the time when they claim the right to make exposures of mineral terminates. As they are basing their claim to the ground on what they assert the conditions were in September, 1913, it is upon them to prove those conditions at that time, not upon us to do so.

SECTION 562f. This Court will also observe from the form of the questions to which we were limited, that we were prevented from interrogating witnesses about the more important characteristics of veins and lodes, viz.: width, strike, dip, etc., unless shown to have been exposed before September, 1913, or unless known to the testifying witness before then. Yet these are the essential factors, rather than the values at any one point, as we have shown. With questions so limited throughout, it is fortunate that we obtained the testimony as to veins and lodes which we have, and which is hereinbefore abstracted. But without being so restricted, we could have proved much more, and it was error to so restrict examination, under the principle of the cases cited within Sections 480, 548-549 hereof. It was further error because of the shifting of the burden of proof to defendant, and because the question of the validity of the adverse claim to the Guy Davis relocation was still in dispute and liable to be defeated, and the date thereof should not have been taken as axiomatic as to validity

in ruling on the admissibility of evidence, which was liable to defeat the same. And because also the law requires now a finding for or against the claims of both plaintiffs and defendant, to the ground in controversy; and if plaintiffs' claim be rejected, the evidence was competent to support a finding for defendant under his locations.

SECTION 562g. The Court will also observe from the form of the questions to which we were limited that we were prevented from interrogating the witnesses about the more important characteristics of veins and lodes, viz., width, strike and dip, etc., unless shown to have been exposed before September, 1913, or known to the testifying witness before that time. Yet these are the essential factors of a vein, rather than the values at any one point, as we have shown. With questions so limited we were fortunate to obtain the testimony heretofore abstracted as to lodes and veins. Without such restriction we could have proved much more, and it was error to so restrict under principle of the cases we have cited. Also because of the shifting of the burden of proof to defendant, and because the question of the validity of the adverse claim to the ground, under the junior Guy Davis relocation was still in dispute and liable to be defeated. The date thereof should not have been taken as axiomatic as to validity in ruling upon the admissibility of testimony which was liable to defeat the

same. Also, because the law now requires a finding for and against both plaintiffs and defendant, and if plaintiffs' adverse claim be rejected, it was competent to support a finding for the defendant for the ground under his locations.

SECTION 562h. By the ruling made that it was upon the defendant to prove mineral was discovered on the ground prior to September, 1913, there was an entire reversal of the established rule of law that mineral discovery and due legal compliance is presumed in aid of an existing prima facie mining location, especially one in the hands of a good faith purchaser in reliance upon the record. (Sections 152, 180a, 195, 197, ante.) It was a reversal of the rule of law that a location certificate reciting exposure of a vein is sufficient proof of discovery on a mining claim in the hands of subsequent owners and purchasers; and of the rule of law that the burden of allegation and proof of invalidity, non-discovery or other detriment to a claim is upon the junior claimant seeking to disturb possession under the senior location.

SECTION 562i. By the operation of the ruling also, an owner of a mining claim, or of any other kind of property, who has paid his good money for it and received a deed, with a lawyer's opinion on an abstract of title, and taken possession and improved immensely, may by the mere process of being sued in a court of law, be converted into a presumptive wrongdoer—a prisoner at

the bar deprived of all presumptions, and compelled to prove his title good or be deprived of it, and plaintiff treated as presumptive owner. Not only so, but prove it good against every possible defeat, where none is alleged against it.

SECTION 562j. For the errors considered herein the judgment below should be reversed.

CHAPTER XIV.

ERRORS IN EXCLUDING QUESTIONS AND TESTIMONY FOR DEFENDANT.

SECTION 563. *Assignments of Error.* This chapter relates to the errors assigned, Nos. 29 to 38. (Sections 656-665, post.)

Some of the testimony rejected, as recited in Assignments Nos. 29 and 32 to 38, went to the theory on which certain work and improvements were done as group work, and as tending to the benefit of all of the claims in the group, such as the cost of the mill, buildings, roadway, leaching plant and labor on the extensive tunnels and adits.

This testimony was competent and material on several grounds, viz.:

1. On the ground of annual labor on the mining claims.

2. As denoting acts of possession and working so as to confer title under U. S. Rev. Stat. Sec. 2332.

3. As showing good faith in making and holding the mining claims, as the buildings, mill, roadway, etc., while chiefly on the Salt Lake No. 3, were of a nature to benefit all of the claims in the group, in the way of handling the mineral output and housing the workmen.

SECTION 564. But as the full performance of the

annual labor upon all the claims for all years was admitted by plaintiffs (Record p. 686), and that subject withdrawn from the jury (Record pp. 1225-6), the rejection of the testimony became harmless as to ground No. 1, supra.

And in view of that fact, and the undisputed testimony set out and abstracted at the end of Chapter III and the law as contained in that chapter, we conceive that our title by adverse possession and working (ground No. 2) was fully proven without the rejected testimony. Still, it was competent and material evidence in support of the second affirmative defense in our answer, and as the jury were triers of the fact they might on this testimony have returned a verdict for defendant.

SECTION 565. And while they can claim no forfeiture, and assert none, we were injured by the rejection of the testimony mentioned, on the ground No. 3, supra. For had the jury been permitted to know the enormous sums expended in the improvement of this property, and the cost of it, they might have seen the enormity of taking such valuable property from the owners and handing it over to claim jumpers without consideration. As the performance of full assessment work on all the claims for all years was admitted by plaintiffs, and the subject withdrawn from the jury (Record pp. 686 and 1225-6), we will not devote as much time to this as we would otherwise have done. While they can claim no forfeit-

ure, we believe we were injured by the exclusion of the testimony as to the cost of the work and improvements; yet as denoting acts of possession which one will perform upon property of his own and will not perform on the property of another, the evidence should have gone to the jury.

SECTION 566. It may be true, as the Court remarked under Assignment No. 29 (Section 656, post), that it is the character of our possession that makes it adverse. Yet how is the character of one's possession evidenced other than by what he does there to indicate that possession? Personal presence is not necessary, as we have shown; neither is residence. The nature of mining property is such that possession is ordinarily evidenced by what the owner *does* there and causes to be done by others. If spending $100,000 there in labor alone, causes the property to be occupied, improved and developed, and all annual labor done and the law as to mining claims complied with, surely the expenditure may be proved to the jury by way of informing them of the extent to which acts of possession have actually been carried on and conducted there—in connection with proof of the houses, mill, roadway, developments, etc., produced by that expenditure.

SECTION 567. Under Assignment No. 32, when we offered pay-rolls to show that more than $100,000 had

been expended for labor alone on these claims as a group, upon objection the Court ruled:

"You have not offered to show what fractional portion of the work represented by this pay-roll was done on these three particular claims."

This was contrary to the theory of group work on a group of claims.

"Where several contiguous mining claims constitute a group, and expenditures are made upon an improvement which is intended to aid in the development of all so held, the improvement constitutes a distinct entity, not subject to physical subdivision or apportionment in its application to the claims intended to be benefited by it. The work performed attaches to the claims collectively, and not severally. This is the rule clearly and forcibly announced by the Secretary of the Interior in re James Carretto and Other Lode Claims, 35 Land Dec. Dep. Int. 361, 364. It is there said: 'To undertake to set apart or apportion a physical segment or section or an arbitrary fractional part of a common improvement, and to credit the value thereof to a particular claim is in violation of the theory of a common benefit accruing from a common improvement. The scheme here invoked for adjusting the monetary worth of the benefit derived from a common improvement is on its face unreasonable and leads to a result but little short of absurd. The department is of opinion that it is unwar-

ranted and unauthorized by, and contrary to, the law.'"

Duncan vs. Min. Co., 111 Pac. 594.

SECTION 568. The evidence as to the cost of the labor and improvements was also admissible on the theory on which the courts protect large expenditures in good faith, and refuse to review the wisdom or expediency of the expenditures of the owner in developing or improving his property, whether the best method of development in the judgment of another be followed or not.

"As between the claimants in the case before us there can be but little question as to which of them has the superior rights. One who has spent a large sum of money on a mining location in a good faith endeavor to develop it into a mine unquestionably has a superior right to the property over one who enters with the sole purpose of appropriating to himself the fruits of the foresight and labor of the first occupant. Whatever may be said as to a forfeiture of these particular claims as against a valid subsequent location, there was no abandonment of them. There was at all times a good faith and intent to return and take up the work; and this is a superior title to one who enters without right in absence of the first party, and seeks to appropriate the first party's labor and effects."

Davis vs. Dennis, 43 Wash. 54; 85 Pac. 1079.

"The judgment is affirmed."

104 Pac. 130.

SECTION 569. And this is true, whether the question relates to shafts, tunnels and excavations in the ground, or to surface improvements like mills, leaching plants, roadways, houses, etc., intended for handling the mineral output and for housing the men who work on the property.

Regarding the underground workings and excavations, there was testimony that one tunnel or adit—the Farren adit—had been extended into the mountain 1,000 feet long, with about 300 feet of drifting off from crosscuts in the tunnel, and some 200 feet of other work therein, done in 1908 and 1909. (Record p. 680.) The portal of this tunnel or adit was about 200 feet from the Salt Lake No. 3 ground, and extended generally away, but this circumstance does not prevent its inuring to the benefit of all the claims, and is not determinative of the question of benefits.

Hall vs. Kearney, 33 Pac. 373.

Sherlock vs. Leighton, 63 Pac. 580.

And, at any rate, it is a question of fact for the jury, if any issue were raised as to the existence of benefits, and not for the Court or plaintiffs to decide. Cases cited supra.

SECTION 570. Mr. Ralph as a mining engineer testified at Record pp. 948-953 that this adit might very

well have resulted in benefit to all the claims including the Salt Lake No. 3, Midas and Evening Star. But we do not ask the Court to go into the economic features of this tunnel or other underground workings, since that is a question which the law vests in the owner who expends his money upon a given development or prospecting of his property. Whether well or ill advised from an engineering or mining standpoint, and whether the results be fortunate or not, if the owner spends his money in fact, he will be credited with *good faith* at least in the effort to develop his property and to accomplish something worth while—unless we assume as a proposition of law that every mining man who fails to accomplish good results in driving an expensive prospecting tunnel at his own expense, must lose his investment and his title to the ground.

SECTION 571. Then there were the Eagle Tunnel, 300 feet long, in the hard rock of the mountain, and the Midas Tunnel, some 60 or 75 feet long, designed to benefit some five or six claims around them.

And the roadway from the canyon up to the mill, the mill itself and leaching plant, the office, bunk houses, boarding house, etc., which from their nature were designed to benefit all the claims from their very nature, and wherever mineral might be taken out, in handling the ore, milling, leaching and shipping it, and housing the workmen, etc.

In disbursing the more than $100,000 for labor alone shown by the rejected pay-rolls of the company, the prosperity of that community was enhanced, and the names of Guy Davis and Noah Faubert, two of our antagonists in this litigation, are seen thereon, regularly receiving their per diem and deriving profitable employment. These pay-rolls, though not admitted in evidence, were filed and under stipulation of counsel (Record p. 1245) and the clerk's certificate (p. 1254) have accompanied the record into this Court, where the Court may see and examine the same.

SECTION 572. Plaintiffs' theory was that where one has a group of mining claims, all these improvements in their nature adaptable to the use of all the claims are presumptively not for the benefit of the particular units of the group upon which they have filed their conflicting junior locations, and must be proved to be such by defendant, and also the extent in dollars and cents to which they will be benefited, or else he loses them to the plaintiffs. The assumption is erroneous and of a piece with all the other assumptions affecting the question of mineral discovery, concerning which they have sought to load upon defendant the burdens which the law places upon themselves, in their capacity of jumpers and aspirants seeking to take over the property of another.

SECTION 573. In Assignment No. 35 (Sec. 662),

the Court excluded a question as to the cost on the ground that "it does not seem to me that was done for the development of the claim, or that was its purpose," referring to a road leading from the common roadway in the canyon up to the mill on the hillside, whereas the jury, being triers of the fact, the Court was not at liberty to substitute its judgment on this question, but should have left it to the jury. Mr. Ralph testified at Record p. 967 that the mill was erected on a general principle tending to the benefit of the whole group, and it could not be disassociated in purpose from any of the claims of the group. There was no testimony to the contrary.

SECTION 574. Plaintiffs below contended at one time that some of the group improvements did not benefit all the claims, but seeing that they conceded that all annual labor necessary to preserve each one of these lode claims had been performed, and that no forfeiture had occurred, we do not see where they are entitled to discuss that feature. If it was so intended by the owners of the lode claims to prospect for and thereby develop each, as testified, it was they who were spending their money, and not the defendants in error herein. The Courts will not, and the law does not supervise the wisdom and propriety of expenditures by mining claim owners. It was testified that the Farrin adit, 1,000 feet long, was a reasonable method or plan of development of each of the claims, from the standpoint at the time it was pro-

jected and begun. Seeing that the annual labor was all confessedly done, it is only evidential as denoting acts of possession which an owner will do with respect to his own property, and will not do with respect to the property of another. The fact that they did do it, and spent their money, is enough in this respect.

SECTION 575. The same is true with regard to the buildings. They could not be said to benefit only the claim they are standing on. And if they did, there were abundant acts of possession otherwise, and defendants in error can not profit thereby, seeing there was no forfeiture. Their arguments amounted to this: Here is a group of mining claims. Each has valuable lodes and veins, we will say. The owners must select, seeing it is not profitable to run shafts and drifts upon each claim at one time, and it is not economical to do so. Therefore the owner gets his engineering advice, adopts a plan of development, which requires him to begin shafts and drifts at one or two positions on the claims, which they regard as more promising or more economical to work. It may cost many thousands and hundreds of thousands to do that work, and meantime the other claims with their veins and lodes must wait. Meantime buildings, mill, roadways, etc., tanks, must be built and operated. Their argument is that all these outlays are for the sole benefit of those claims on which work was first begun and not for the benefit of the others, on which it may

later be found that even more valuable ore exists. The mill shall not be considered beneficial in treating ores upon any of the claims but that first opened.

SECTION 576. The law does not authorize any such contention, and we dare say very little money and capital would ever be invested or expended in mines, or mining operations or improvements, if the judgment and wisdom of the owner in making such expenditures were subject to review years later by the courts or juries, to the extent that they might lose the properties if it be decided that the expenditures were not wise or judicious, or did not benefit this or that unit of the group as much as contemplated at the time.

There are enough hazards and risks incident to the mining business itself, without adding to it this risk of forfeiture itself, in case their expenditures do not produce the result anticipated by themselves, or by strangers.

SECTION 577. *Assignment No.* 39. (Sec. 666, post.) *Payment of Taxes.* At the trial we offered a certified copy of the county tax records of Lander County, Nevada, showing the payment of taxes on these mining claims or the improvements thereon—the assessible valuation of the claims. (Record pp. 665-689, 1092.) It was rejected. This was error.

"Payment of taxes on a mining claim for five years (local period of limitations in that state) gives a title

to the claim superior to any other except the government."

Min. Co. vs. Willis, 127 U. S. 473.

"Performance of annual labor and payment of taxes for more than the period of limitations."

Walsh vs. Erwin, 115 Fed. 531-7.

SECTION 578. *Assignment No.* 40. (Sec. 670, post.). In this assignment we complain of the rejection of evidence of a vein extending up the side of a shaft to the surface at the mouth of the shaft. This was error, and the evidence admissible under the principle of the cases cited in Sec. 548 hereof, regardless of what we could prove, was known of that vein by our predecessors in the chain of title, at any point of time. The burden of showing what our grantors and the locators knew of the vein is not placed upon defendant as owner of the senior location. For the claim is upheld prima facie by the law's presumptions. The burden of disproving such knowledge is upon the defendant if he would assail it on that theory; provided, that there were no irrebuttable presumptions to protect the location and foreclose inquiry on that subject. See cases cited infra, Sections 191-199, 203-206, 249-262.

SECTION 579. *Assignments Nos.* 40-A, 40-B, 40-C, 40-D and 40-E (Sections 668-672, post), each relates to evidence of lodes and veins on the Salt Lake No. 3 at different points, and objections and exceptions are laid

upon the same principles as referred to in the last section.

Evidence of a vein four feet wide was excluded under this mistaken theory of the law.

The evidence was also admissible to rebut plaintiffs' testimony on the same subject.

SECTION 580. We cite without repetition at this point, in support of the errors assigned in the rejection of defendant's testimony as to lodes and veins at divers points on the ground, regardless of whether we could prove they were known by our grantors to exist prior to September, 1913, the cases cited in Section 548 hereof.

Such evidence was further competent and admissible on the principle of the cases cited in Sections 549 and 480, ante. If it is competent to prove lodes and veins and general mineralized conditions upon adjoining ground outside the claim, and upon which mineral discovery could not operate to sustain the claim itself, it is certainly competent for the same reasons to prove general mineralization, lodes and veins *within the claim* itself, regardless of proving that our grantors saw and knew of those veins.

The rejection of samples and assays showing values was one part of the embargo laid upon examination of witnesses in general, unless restrained to September, 1913, as considered in the preceding chapter. (Sections ~~525-526,~~ ante.)

559-562

SECTION 580a. For the errors assigned and discussed in this chapter the judgment below should be reversed.

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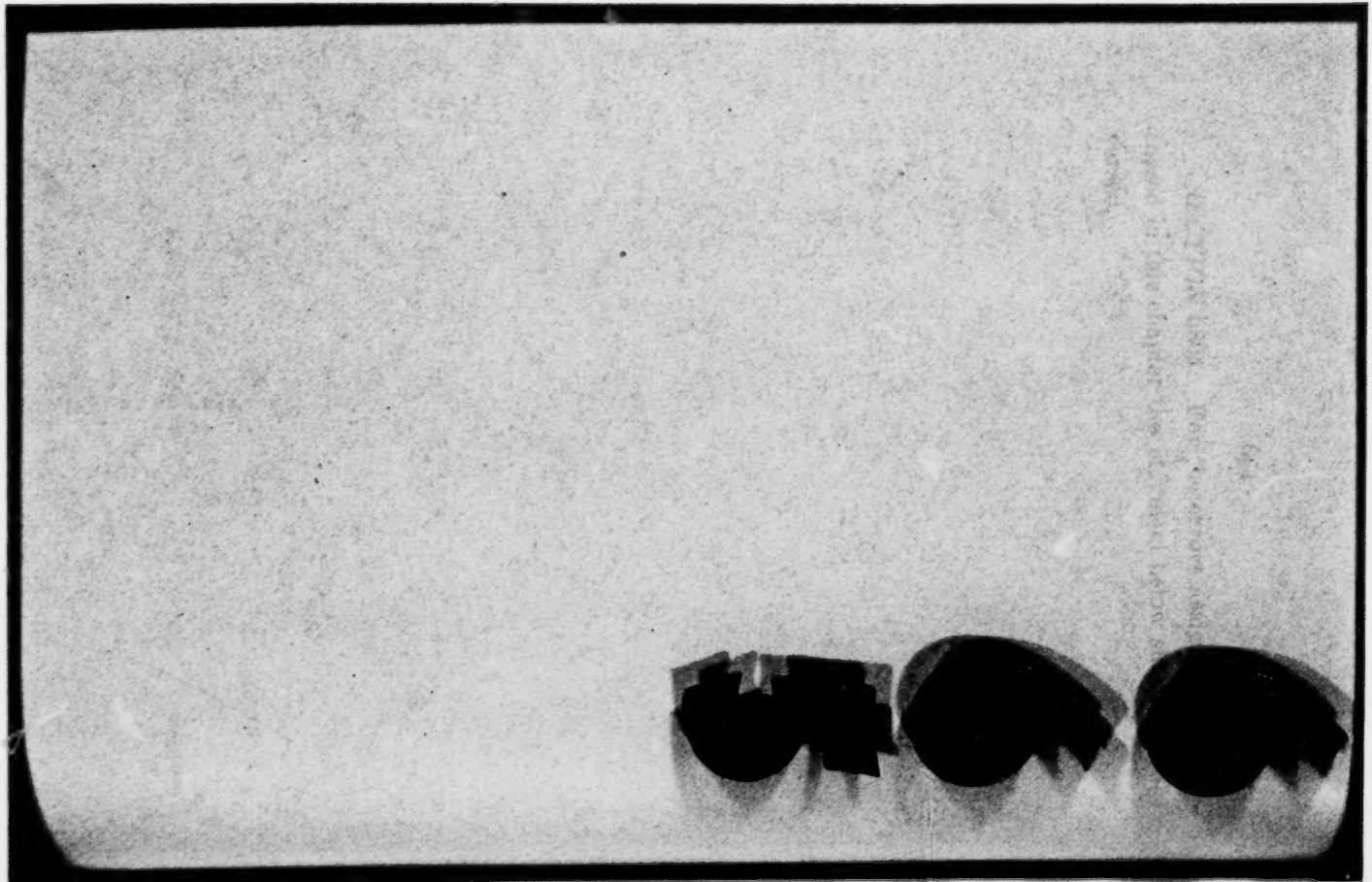

CHAPTER XV.

INSTRUCTIONS REFUSED, BUT REQUESTED BY DEFENDANT.

SECTION 581. Under Assignment No. 42 (Sec. 674), we complain of the refusal of the Court to instruct the jury to find a verdict for the defendant.

We were entitled to have the jury so instructed peremptorily for the reasons set out in Chapters 2, 3, 4, 5, 6, 7, 8, 9 and 10 respectively.

SECTION 582. Under Assignments Nos. 43, 44, 45, 46, 47 and 48 (Sections 675-680, post), respectively, we complain of the refusal of the Court to instruct the jury as to the law of adverse possession as therein requested. Each one of these instructions is based upon the law and the undisputed facts of the case, as set out in Chapter III hereof, and the refusal of the Court to so instruct was error. There being no testimony in the case contrary to or in conflict with our testimony as abstracted in Chapter III, it was really the duty of the court to instruct a verdict absolutely for defendant, and not leave it to the discretion of the jury to find against us—there being no disputed question of fact to be decided by them. But if the Court determined to submit it to the jury at all it was the duty of the Court to properly instruct the jury upon the law governing our defense under the sec-

ond affirmative defense of our answer, and testimony in agreement therewith.

Its refusal to instruct as in Assignment 41 was further error because of the testimony showing vein or lode disclosures at other points on the Midas, Evening Star and Salt Lake No. 3 than the original discovery points. See citations to the record and decisions in Sec. 444, ante.

At Record p. 1202 the Court announced that it would not submit to the jury our defense and title by adverse possession (under U. S. Rev. Stat. Sec. 2332). Our exceptions were duly made at the time, and entered immediately following the instruction as given, on Record p. 1240.

The Court said (p. 1202) that he excluded the instructions asked:

"Not because they do not state the law correctly, but simply because I regard them as unnecessary."

Why the instructions were *not necessary* was not stated by the Court, and we do not know why it regarded them unnecessary. There was a plea of the statute in the second affirmative defense of the answer. (Record pp. 24-25.) The facts pleaded therein were denied in the plaintiffs' reply (Record p. 30), and an issue made thereon. There was no suggestion by either court or counsel at any time that the facts there pleaded by us were insufficient to state a case and to derain title and right of possession under the statute. No demurrer

was ever filed. No criticism was made by Court or counsel that we had not fully proved the facts alleged in our second affirmative defense. The evidence and testimony to establish that defense was undisputed in the record. They made no contention that our witnesses had not testified truthfully in that behalf. So WHY was it NOT NECESSARY to submit it to the jury?

The Court also said at the same time (Record p 1202) that:

"I don't think there is any adverse possession in the case, so the instructions based on adverse possession will not be given."

Here also the Court leaves us in the dark. WHY was not adverse possession IN THE CASE? If pleading and proof and a demand for the protection of the statute does not bring it *into the case,* how is such defense ever to GET INTO A CASE? How is a statute of the United States ever to get enforced, if the courts are to take no notice of such a statute, and consider it out of the case, when it has been duly pleaded, the facts proved, and its provisions invoked?

SECTION 583. Under No. 49 (Sec. 681, post), we assign error on refusal of the Court to instruct the jury as to the resulting trespass from attempting to locate a mining claim upon the improved, occupied and located ground of another, and its refusal was error. See decisions in Sec. 207, ante.

SECTION 584. Assignment 50 (Sec. 682, post) relates to the result of misjoinder of parties plaintiff as shown in Sections 52-59, ante. The Court should have instructed for defendant for this error, or else dismissed plaintiffs' adverse, but if it determined to submit the case it should have instructed the jury as to the effect of misjoinder as preventing either judgment or verdict for plaintiffs.

SECTION 585. *Relief.* For the errors discussed in this chapter, and assignments herein, the judgment below should be reversed and a new trial ordered.

CHAPTER XVI.

THE INSTRUCTIONS TO THE JURY.

SECTION 586. In Assignment No. 51 (Sec. 683), the Court erred by assuming the validity of the Guy Davis relocation, and telling the jury that the locators thereof had complied with the law in discovering and locating the same.

In so doing the Court ignored the law and facts by which the Davis location could not have been validly located at the time it was attempted to be made, in September, 1913, because the ground was not open and vacant public land of the United States; that the land was then held under prima facie valid locations by defendant's grantors with nothing alleged against them in plaintiffs' complaint (Chapter IV); that defendant's undisputed possession and working for over two years gave an indisputable title and location as shown in Chapter III; the absence of title and right of action in plaintiffs under Chapter II, and the other defects of pleading and proof we have hitherto shown. It was the duty of the court to have instructed the jury that plaintiffs had no appearance of title, cause of action, or standing to question the lode claims, and to instruct a verdict for defendant.

SECTION 587. The Court under Assignment No.

51 further erred by submitting the question of invalidity of the Salt Lake No. 3 to the jury. That was not an hypothesis presented by competent conflicting testimony within the issues, and was not the subject for such jury instruction, since it authorized the jury to find against defendant without evidence, and contrary to the evidence and the law. Particulars specified in the preceding chapters. The validity of the Salt Lake No. 3 was uncontroverted so far as the testimony was concerned, as we have shown in previous chapters, but especially under the testimony cited in Chapter III and also Chapter II.

SECTION 588. In Assignment No. 52 (Sec. 684, post), the court erred in instructing the jury as to the law requiring a mineral discovery to sustain a mining claim. Having just told them that the Guy Davis claim was valid and according to law, this instruction could only be construed as intended to permit a finding and verdict against defendant on the theory of want of iscovery.

The facts and the law showing actual mineral discovery in Salt Lake No. 3 sufficient to support the same as a mining location, is shown in Chapter IV and X hereof.

The facts and law showing absolute title by adverse possession and working under U. S. Rev. Stat. Sec. 2332 is shown in Chapter III hereof, and that the inquiry as to mineral discovery was barred thereby.

The facts and law showing plaintiffs had no status as adverse claimants is shown in Chapters II and IV to IX hereof.

There was no hypothesis presented by competent conflicting testimony within the issues to justify the submission of this question to the jury as invalidating the lode claims.

SECTION 589. The law as so declared never has been applied to a perfected mining location in possession of the locator for a number of years with all assessment work performed, and with some evidence of the existence of a vein or lode at or immediately under the surface such as may lawfully be located upon as a mining claim under the federal and state statutes. It has only been applied in such a case as Hanson vs. Craig, 170 Fed. 62, where the rival locators entered nearly simultaneously, one of them preceding the other by two or three days only in actual work, then going off after supplies without completing his location or finding mineral; during which absence the second locator entered and actually discovered mineral. It is from such a case as this that the plaintiffs took their excerpt for a request which went into the instructions of the court, disregarding thereby all the superior rights accruing to defendant by the facts of this case, which were not in Hanson vs. Craig.

SECTION 589a. Hanson vs. Craig especially lays down the law that no person can enter upon the *actual*

possession of another under prior location by any form of forcible, fraudulent, surreptitious or clandestine conduct, and seek to establish himself or acquire rights. The entry by plaintiffs was of this class, for a number of lawsuits have grown from it already, including the injunctions, etc.

It is certainly not presumed in law that their entry upon the occupied ground of another was lawful, or free from force, fraud, or secrecy. The presumption in such cases is practically universal that the entry is a trespass, since we find it laid down in all the cases that a location upon ground already located upon by another is a trespass, and no rights are acquired thereby. (Sec. 207, ante 200-1, 281-300 ante

SECTION 589b. But if plaintiffs below intended to build any right on the theory of a license or permit to enter and locate from defendant or his grantors, it was upon them to both allege and prove the same and not to introduce it for the first time by jury instruction. See next section.

SECTION 590. Under Assignment No. 53 (Sec. 685, post) we complain of a further instruction of the Court extending the theory of the preceding instruction in No. 52. It is erroneous for the same reasons recited in the preceding section, and for the further reason that it assumes as a fact without any proof whatever that the locators of the junior Davis relocation *were permitted*

by defendant or his grantors to go upon the ground for the purpose of locating such Davis location. Since plaintiffs received the benefit of this instruction, we challenge them to produce and cite to the record by pages, any testimony or proofs showing that defendant or his grantors licensed or permitted anyone to enter and locate the Davis claim.

As stated in the assignment (No. 53), there was no evidence that defendant's grantors' rights in September, 1913, rested upon a mere intention to locate the ground, without discovery or other acts of location, so as to bring it within the rule in Hanson vs. Craig, and the instruction asked and given for plaintiffs was error.

SECTION 591. Assignment No. 54 (Sec. 686, post). In this assignment the Court tells the jury that there was a conflict in the testimony as to whether Mr. Ralph actually discovered a vein in the shaft or open cut numbered "2" on the map, plaintiffs' Exhibit A. We take issue on this statement and say there was no conflict, and the charge misleading. If defendants in error should believe that there was a conflict, we ask they be required to set out the conflicting testimony and cite it to the pages of the record.

The only testimony there is on the subject of mineral discovery within that cut is that set out and collected in Sec. 498, ante, for plaintiffs, and Sec. 506, ante, for defendant. Defendant's witnesses testified to seeing

the physical indicacia of the vein, that is, the walls, the width, the strike, the dip, the included vein material, with appreciable values in the precious metals. Plaintiffs' witnesses also saw the same physical occurrence in that cut, but they chose to call it a break, fracture, and other like names. They also obtained a sample which yielded assay values in the precious metals, thus corroborating the defendant, not conflicting with his witnesses as suggested in the instruction.

The only qualification or explanation the plaintiffs make is that they must have commercial values or pay ore at the surface, and so evenly distributed as to preclude a barren sample being taken; which requirement the law rejects. So that the only conflict there is regarding this cut and the vein therein contained is between the plaintiffs' witnesses and the law, which is in a matter of legal conclusion. In such a conflict the witness yields to the law. There is no conflict of fact between plaintiffs' and defendant's witnesses' testimony. The instruction was misleading and therefore error.

Furthermore, the instruction was error, because the validity of the Salt Lake No. 3 in the matter of mineral discovery did not in any wise rest or depend upon whether Mr. Ralph himself saw, or realized, or appreciated, or understood that he had made a discovery, and that the four-foot vein in cut 2 was valuable. Mr. Ralph himself only became the owner of the property some time

in 1914. (Sec. 118, ante.) The Salt Lake No. 3 had been located in 1897. Sundry exposures of lodes and veins had been made elsewhere on the claim than cut No. 2, which made it a valid location under Sections 444 and 466, ante. And without those lode and vein exposures elsewhere, the testimony as to the four-foot vein was admissible without appreciation or realization by Mr. Ralph, under the cases cited in Sec. 548, ante, especially under Southern Cross Min. Co. vs. Europa Min. Co. 15. Nev. 383.

Realization and appreciation by Mr. Ralph was also unnecessary in view of the recorded location papers reciting ~~an important~~ and importing mineral discovery in the Salt Lake No. 3 (Sec. 197), and the legal presumptions which support the location. Secs. 191-199, 203-206, 249-262, ante.

It was error also because ignoring title by adverse possession under Chapter III hereof.

SECTION 592. Under Assignment No. 55 (Sec. 687, post), we complain of another jury instruction about mineral discovery on the lode claims, wherein the Court (condensing it) said:

"It is not sufficient to constitute a discovery within the law that the locator would be willing to expend his time and money, since willingness unless followed by exploitation, is a mental state which cannot be satisfactorily proved."

The chief trouble with this is that it is not applicable

to the facts, as we will see presently. As a matter of fact, it was copied into the Court's instructions from one of plaintiffs' requests, where it had been copied by plaintiffs' attorneys from a paragraph in Lindley on Mines (3d Ed.), Sec. 336, where it was copied from Lindley's 2d edition, where it must have been copied from some case, or annotation, or the author's own impressions.

By following the extract around through all these copyings, it will be found to precede and be followed by the statement that:

"The facts which are within the observation of the discoverer and which induce him to locate, should be such as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property."

SECTION 593. This last statement of the law is correct, and is sustained by the cases cited in Lindley, as well as by those cited in this brief. (Sec. 333, ante.) But the first paragraph, supra, was simply a statement by Mr. Lindley, in his second edition without citation to its support. He cites McShane vs. Kenkle, 44 Pac. 979, to the paragraph, but that only tends to support the last paragraph (quoted supra), and not the first, which has been copied so much in this case. And this is true of all the cases cited to the same paragraph in Sec. 336 of third edition of Lindley

SECTION 594. In Ambergris Mining Co. vs. Day,

85 Pac. 113, the Court, speaking of this paragraph about willingness, etc., from Lindley (2d), Sec. 336, said:

"Judging from the cases cited by the author in support of the foregoing statement, we infer that he makes that statement as a general principle, and without any intention of its special application to a contest between two miners who have located the same ground as a lode claim."

"Again, under our statute, the discovery must be followed by doing the location work within sixty days, which is itself at least a partial *exploitation.*"

And annual labor completes all the exploitation required by law. See section 484-485, ante; sec. 595, post. Eq 15

The same is true in the case at bar. The original discovery has been in fact followed and exploited by doing the location work within ninety days (sections 115-120, 171-173, 179, ante); and further by performing all required annual labor (Sec. 118, ante), and by opening up veins and lodes at other points than the discoveries (Sections 427-430, 505-509, ante), and by the further extensive group workings mentioned in Sections 171-173, 563-576, ante. Willingness has been not a mere mental state here, but ~~a physical~~ an accomplished fact or facts.

SECTION 595. So it is not a case of mere willingness, but of actual development, prospecting and exploitation by far exceeding the requirements of the statute, in the case of the Midas and Evening Star lode claims.

"By the requirement of sufficient mineral discovery to warrant development, the law does not mean the expenditure of sufficient time and money upon a claim to the extent of opening up the whole thereof, and acquiring an exhaustive knowledge of its resources. It means equivalent to 'exploitation.'"

Charleton vs. Kelly, 156 Fed. 436.

"Oftentimes in such districts a discovery is made upon a 'seam,' a term often used synonimously with 'stringer,' and commonly understood by miners to be a crack or crevice filled by a mineral deposit occurring in the country rock, and by means of which the prospector anticipates being led to an ore body or deposit of commercial value.

"Upon such a seam the evidence tends to show the discovery was made, and if so made, the location thereof was valid in law."

McShane vs. Kenkle, 44 Pac. 980-982.

"The locator need only be justified in *prospecting and developing* the ground located."

Id., 982, col. 2.

Book vs. Justice Min. Co., 58 Fed. 120.

"The mineral showing need not be such as to justify a practical miner in locating the ground."

44 Pac. 980-1.

SECTION 596. The trouble with plaintiffs' requests for instructions is that they went from book to

book culling out a choice phrase here, and another one there, that may have seemed to tickle the ear, without any regard for the facts and conditions under which the particular rule of law came to be ~~enumerated~~ enunciated.

And when these were read into the instructions, it is no wonder we find an incorrect rule prejudicial to the defendant coupled together as one continuous phase or sentence with another statement which condemns the verdict and judgment they obtained, because their evidence does not square with the requirements as to disproof of mineral discovery thereby announced.

And as suggested under our asignment of error No. 55 the whole question is one that is barred and prevented by our good title acquired by over two years possession and working (Chapter III hereof).

SECTION 597. *Assignment No.* 56. (Sec. 688 post.) This instruction was error for the reasons set forth in the assignment itself. Further because the court raised the possible implication of failure to comply with the law in some other respect, as to monument, posting notice, and defining boundaries. There was neither issue nor proof to dispute these, and the court itself instructed the jury at record page 1225 that the Salt Lake No. 3 was free from question on any such grounds other than want of mineral discovery. This was therefore a conflicting instruction misleading and confusing to the jury. It was error therefore to so instruct.

SECTION 598. Under Assignment No. 57, sec. 689 post, we complain of a further instruction as to mineral discovery on the Salt Lake No. 3, and the requirements of such. The case does not turn upon any question of fact or testimony requiring the giving of that instruction. The only testimony on which the plaintiffs may argue that the jury could base a verdict that there was insufficient mineralization in the veins and lodes actually uncovered on these lode claims, is the statements of their witnesses. (Secs. 498-501 ante) that they took samples "at" or "in" certain cuts or excavations which were assayed and yielded only "trace," in some cases, and in some they obtained values. It was not testified that these samples came from within the walls of the fissure or which ones did, and even if we concede without testimony that they did, the mere barrenness at one or two points in a vein is not evidence against its genuineness, nor against the validity of the location. (Secs. 389-407 ante.)

This, together with testimony by defendant's witnesses that they did find not only values, but the more important and decisive characteristics of veins than values, viz: the walls and included vein matter, having strike, dip, and different character from the country rock (Secs. 427-430 and 502-509 ante) the testimony of plaintiffs' witnesses that they saw the same things (Secs. 388, 408-409, 498-501 ante); their further testimony that they would not recognize such formation or fissure occurrences as a vein without

it contained values approximating pay ore or commercial returns at the surface where they looked, (Secs. 388, 408-409 ante) and our case is complete that lodes or veins do exist without dispute or contradiction as to the facts. The evidence does not turn upon any question of insufficient mineralization to justify a prudent person, etc., within the rule of law upon which the court instructed the jury in this assignment.

Furthermore this instruction was improper in view of our right and title under U. S. Rev. St. Sec. 2332 (Chapter III hereof).

And it was an instruction without the issues made by the pleadings, as well as at variance with the evidence.

SECTION 599. The hypothesis suggested upon which the court instructed without the issues and evidence was not presented by plaintiffs' testimony as to the alleged samples and assays taken from *at* or *in* 2 or 3 cuts or openings on each lode claim, for the reason we have presented; that is, because not testified to have been within the walls or boundaries of enrichment or mineralization of the veins testified to by themselves and our witnesses, but also that hypothesis was not presented by such or any evidence, because not directed to the exact physical conditions and locality on the claims where the original mineral discoveries were made, upon which the locations were based, and which influenced the locators to make the locations. Nor was such hypothesis adapted

to the testimony as to the subsequent discoveries made by the owners of the lode claims since the original locations were completed, within the principle of the cases cited in Secs. 444 ante, and testimony there referred to.

But if we say the court may have had in mind the defendant's evidence as to mineralization at those points on each claim where lodes and veins and mineralization was pointed out, and also plaintiffs' evidence which was in agreement therewith, (or upon the same points on the ground), as the hypothesis upon which the instruction was sought to be predicated, then the answer is that it was inapplicable, because there was no testimony embraced therein, from which the jury could legitimately draw the deduction of insufficient mineralization to constitute a vein, as we have shown in Secs. 389-407 ante. And any verdict pursuant thereto would not only be erroneous because misdirected, but because of insufficient evidence and against the law, as previously assigned.

SECTION 600. And so far as the question of *prudence* in locating is concerned, concerning which the court instructed, how can the jury weigh or estimate the degree of prudence exercised by the locators in February, 1897, without the exact physical conditions which then appeared and influenced their decision to locate, are put in evidence? As shown in Secs. 381 ante, hardly two prospectors agree on the lode merits of ground, even when they inspect the ground on the same or consecutive days.

They do not agree on the merits of what they see, and do not always note or observe the same things or physical conditions. How can we assume that they will be more observing and unanimous in their conclusions, if they examine the ground seventeen years apart, with all the mutations of time, the accumulation of sediment or wash from the hill-sides; the gradual filling up of cavities; the weathering of exposed surfaces with a tendency to increasing kaolinization or bleaching, and the leaching out of values especially of copper which is soluble, and the values being carried down in the vein from the exposed surface of it; the liability to the filling up of shallow surface openings which expose the mineral; (as their witness Healey testified, record p. 310, that he had filled up one such shaft or opening on this ground); the erosion and accumulation of slide and gravel?

SECTION 601. And if the jury could overlook their admissions (Secs. 388, 408-409 ante) that they saw the physical indicacia of veins and lodes in the shape of walls, crevices, seams, fractures and shear zones having width, length and depth, with material of different appearance than the surrounding country rock, and also that they are not including in the term "veins" anything not approximating commercial values;—if the jury could overlook these things, then what evidence have we that the particular spots from which they took their rock samples, were either within areas from which values might be rightfully

expected, or if so, that they were not from a mere unmineralized spot which occurs with frequency in a great many veins carrying large values, and from which profitable shipments are made? And what evidence have we that the original locators did not see and sample the vein from a different spot than plaintiffs' witnesses sampled, even if the latter got in on the vein at all with their samples? And how can a jury determine the prudence exercised in locating the ground unless we determine what it was the locators saw and acted upon?

SECTION 602. A court of review will not determine a question of fact or law upon a partial or fragmentary record of the particular matter. Why? Because the omitted portion, or an additional fact, if supplied, may necessitate a diametrically opposite conclusion in the legal syllogism. And a mathematician will not verify any conclusion reached in an arithmetical or algebraic problem, without all the factors are furnished. Neither will a physician diagnose a case until he can get his facts determined upon by careful inquiry and examination of the patient. Can we more successfully determine the prudence exercised ten and twenty years ago respectively, by what a witness saw 2 or 3 years ago? What these saw could not have influenced the locators 10 or 20 years ago, nor have affected the degree of prudence exercised. We can not guess or presume in plaintiffs' aid, that the precise points they saw were the same as those

the locators saw or observed many years before, or that the locators saw at all the exact spots where plaintiffs' witnesses selected their samples. If the locators did no more than these witnesses testify they did, they would not deserve to find much.

SECTION 603. Under No. 58 (Sec. 690 post), we assign as error the instruction of the court to the jury that the only attack made on the placer claims was that they were located on ground not open to location at the time. This minimized to the jury an objection so vital that it nullified ab initio the placer claims, and deprived the parties of any standing or status in court. We believe this to be reversible error.

SECTION 604. Under No. 59, (Sec. 691 post) we assign as error a further reference to mineral discovery as an element of invalidity of the lode claims. The reasons stated in the assignment, together with what we have said in this Chapter, and throughout the brief, shows the error of this instruction.

The instruction is a repetition of many previous instructions as to necessity of a lode discovery. The extreme frequency and emphasis with which the jury's attention was directed in the instructions to the necessity of a mineral discovery in the lode claims, could only be taken by the jury as an indication that in the opinion of the court the Salt Lake No. 3 was invalid for want of a mineral discovery. The elements of the error have been

enumerated so often we need not repeat, but refer to this and previous Chapters.

SECTION 605. As a proposition of law, instructions should be confined to the issues made by the pleadings and the evidence. It is improper to give an instruction, however, correct, unless it bears upon or is connected with the issues involved, and there has been received some competent evidence to which the jury may apply it. Such an instruction tends to distract the minds of the jury from the real question submitted to them for determination, and thereby mislead them; and if requested should be refused.

38 Cyc. 1612, and cases cited.

SECTION 606. Instructions should be confined to the evidence, and where there is no evidence upon an issue, failure to instruct is not error. On the contrary, instructions on points not raised by the evidence, or directly opposed to the evidence, are erroneous.

38 Cyc. 1617-1619, and cases cited.

We need not multiply citations upon these points for they are familiar to every trial lawyer.

SECTION 607. *Relief.* For the errors discussed in this Chapter the judgment should be reversed and a new trial ordered.

CHAPTER XVII.

THE VERDICTS.

SECTION 608. *Assignment No.* 60. (Sec. 692 post.) The jury returned a general verdict and a special verdict. The general verdict was as follows:

"We, the jury, find a general verdict for the plaintiffs.

J. G. KAUFMAN, Foreman."

The special verdict was in response to a question submitted specially as follows:

"Was there a valid discovery of a lode within the limits of the Salt Lake No. 3 made by the defendant or his grantors prior to the date when the Guy Davis Placer is alleged to have been located?

"Answer: No."

Record pp. 1242-43.

SECTION 609. We complain of this verdict by *assignment No.* 60, and say that it is against the law in each of the particulars wherein we assign that the evidence is insufficient to support the same, under assignment No. 41. These insufficiencies and particulars are discussed throughout this brief, in Chapters 2 to 11, inclusive.

SECTION 609a. We further say that the verdicts and each of them are insufficient in form and substance to base a judgment on, and we specify that they do not show that plaintiffs' success is based upon any legal com-

pliance by them with the law necessary to make a valid mining location, or to entitle them to possession or patent for the ground. And first, the general verdict:

McGinnis vs. Egbert, 8 Colo. 41-55, 5 Pac. 652, was a mining adverse suit in which the jury returned a general verdict as follows:

"We, the jury, in the case of Edward McGinnis et al vs. William Egbert, do find a verdict for defendant in the above case."

and the objection was made that the verdict does not find that the defendant is entitled to the possession of the Winnebago lode claim by virtue of a compliance by him with the statutes of the United States and of the State of Colorado.

HELD: That the object of the suit is for the information of the officers of the general government, and that the proceeding must be conducted in accordance with the statute which authorizes it. The verdict conveys no information whatever whether it was returned for the defendant because he had established his title to the lode in the manner above indicated, or because the plaintiffs had failed to establish their title to the Little Chief, (conflicting location).

For the errors mentioned, the judgment is reversed.

SECTION 610. In an adverse mining suit, a verdict simply finding that the plaintiffs are entitled to the right of possession and which does not allege that they have

such right by reason of a compliance with the absolute requirements of the law, the defendants, is bad, and will operate to reverse a judgment based thereon. (Act of March 3, 1891, considered, providing that if no title to the ground in controversy be established by either party, the jury shall so find.)

Burke vs. McDonald, (Ida.) 33 Pac. 49;
citing:
McGinnis vs. Egbert (Colo.), 5 Pac. 652;
Manning vs. Strehlew, 18 Pac. 625;
Thomas vs. Chisholm, 21 Pac. 1019;
Rosenthal vs. Ives, 12 Pac. 904;
Gwillim vs. Donnellan, 115 U. S. 50; 29 L. Ed. 349.

A more general verdict in favor of either party for the possessory right, as against the other, but not showing that he is entitled to recover by virtue of prior appropriation and compliance with the law, is not sufficient.

Id. Snyder, Mines, 624, N. 4, citing:
Manning vs. Strehlew, 11 Colo. 451; (18 Pac. 625);
McGinnis vs. Egbert, 8 Colo. 41; 5 Pac. 652;
Burke vs. McDonald, 2 Ida. 646, 33 Pac. 49.

SECTION 611. "If, therefore, a judgment is sufficient which shows only, as in this case, the title to be in

the successful party, it might frequently happen that patent would issue to a party who was an alien, or who had never discovered a vein, or in other particulars had failed to comply with the law of Congress."

Snyder, Mines, p. 624, note 5, citing also:

Thomas vs. Chisholm, 13 Colo. 105; 21 Pac. 1019, 1920;

Craig vs. Thompson, 10 Colo. 517; 16 Pac. 24;

McCraig vs. Bryan, 10 Colo. 309; 15 Pac. 415.

As to verdict in jury cases generally, see Snyder on Mines, Section 716.

The government being, as has been previously stated, virtually a party to the proceeding, the finding must be against it as well as against the other party.

Snyder, Mines, p. 624, n. 6, citing 46 Fed. 644.

And unless the court or jury is able to find in favor of one of the parties on all these issues, the action must be dismissed.

I Snyder, Mines, p. 624, n. 7, citing:

Bay State S. M. Co. vs. Brown, 10 Sawy. 243 and notes 1, 2, 3 and 4 ante.

SECTION 612. The reasons given in the preceding sections are amply illustrated in the present case. There is a finding against the defendant, but there is no finding

whatever that the plaintiffs are entitled to the ground, or have complied with the law. And the record shows affirmatively that the plaintiffs are not the owners (Chap. II and III), and have not complied with the law in any of the particulars specified in Chapters 4 to 11 hereof. All claimants of and under the alleged Guy Davis relocation are estopped to deny but bound to admit thereby the entire validity of the prior Salt Lake No. 3 and the consequent unvalidity of their own relocation of the same ground. And part of plaintiffs have no interest of record or otherwise in the invalid Guy Davis relocation.

Yet if the general verdict and judgment are to stand and have any effect, the plaintiffs can go to the Land Office and get a patent on it, without any evidence of ownership or legal compliance at all by plaintiffs as respects the alleged Guy Davis relocation, and although the record shows they are not entitled to it. See citations under next chapter as to insufficiency of the judgment.

SECTION 613. Under clause 3 of said assignment, we allege further that the verdict shows no facts as to legal compliance or ownership of the Davis relocation by the plaintiffs, so as to entitle them to a verdict or judgment, or so as to entitle them to a patent, under U. S. Rev. Stat. Sec. 2325-2326.

This is really but an extension of the preceding clauses 1 and 2 of the assignment No. 60. The effect of

the decisions and the federal statute Sec. 2325-2326 as amended before the trial below is to require the court to find:

1. In favor of one party, plaintiff or defendant, on the ground of a recited compliance with the law and qualifications to purchase;

2. Against the other party for a recited non-compliance with the law or qualification to purchase;

3. In favor of each party as to a portion of the ground in purported conflict, because of compliance and qualifications to purchase; or

4. Against both parties that neither is entitled to possession or has the right to purchase, by reason of non-compliance or disqualification, as the case may be.

In the latter case, it would not terminate our right but would only postpone action upon our patent application under the amendment of 1881 to U.S.Rev.Stat.sec.2326.

The Bennett case arose in Alaska, where by Act of Congress May 17, 1884 (23 St. L. 24) 7th section, the laws of Oregon then in force were made the law of Alaska so far as applicable and not in conflict, etc. The Oregon state statute controlling verdicts was Hill's Ann. Laws,

p. 380, Sec. 320, which required verdicts for real estate to contain:

"First, if the verdict be for a plaintiff, *that he is entitled to the possession of the property* described in the complaint, or some undivided share or interest in either, and *the nature and duration of his estate* in such property, part thereof, or undivided share or interest in either, as the case may be."

In the Bennett case a general verdict was rendered for plaintiff and it was objected that it did not contain the requirements of the Oregon State statute italicized above, but the Supreme Court held that the Oregon statute as to real estate verdicts generally was by its terms inapplicable to a mining adverse suit, where only the right of purchase under U. S. Rev. Stat. Secs. 2325-2326 is concerned. The Supreme Court thus decided what a verdict in a mining adverse case *need not contain* so far as the ~~effect~~ requirement of the Oregon statute is concerned, but it did not decide what such verdict should or must contain, in order to fulfill the purpose of Sec. 2325-2326 as now amended, requiring the rights of both parties and their compliance or no, to be ascertained for the guidance of the Land Office. That question was not mooted, discussed or decided.

The same is true of the case of Maloney vs. Adsit, 175 U. S. 281-9, 44 L. Ed. 167, decided later, and which was based on the Bennett case, and arose under the same

Oregon state statute, and not under the amendment to U. S. Sec. 2325-2326.

SECTION 615. What a verdict should contain in a mining adverse case was apparently ruled in Mining Co. vs. Campbell, 135 U. S. 286:

"The result of the judicial investigation in mining adverse cases shall govern the action of the officers of the Land Department in determining which of the claimants shall have the patent, the final evidence of title from the government."

And in Mining Co. vs. Tunnel Co., 196 U. S. 337-357, wherein the Supreme Court say that the result of the decision between the two mining claimants should be: "a decision which will enable the Land Department without further investigation to issue a patent for the land."

Id.

These quotations are taken from Mason vs. Mining Co. 214 Fed. 36.

SECTION 616. Now, if the general verdict in this case were held sufficient, or the special ones either, the purposes of the mining adverse trial would not be accomplished, and the verdict would not give the Land Department the information which the Supreme Court says it must derive from such verdict. For the Land Department would still have to investigate for itself and determine:

1. Whether plaintiffs were qualified to make purchase and receive a patent.

2. Whether plaintiffs are the grantees of the locators of the Guy Davis relocation.

3. Whether the law has been complied with in locating the Davis claim, or in keeping up the annual labor, or in doing $500 worth of improvements, necessary to a patent.

4. Whether they succeeded at the trial on their own merits, or on account of some defect of proof or proceedings by defendant in respect of the prior lode claims.

5. Whether they have complied with tne law in every respect so as to entitle them to purchase and patent.

SECTION 617. It seems apparent and necessary that at some time all these matters should be set at rest by judicial decision in the courts, before the judgment can be used in the land office. And while the amendment to U. S. Rev. Stat. Secs. 2325-2326 now requires an express finding for or against both parties to the suit, yet in this case the jury did not find anything for or against the defendant, but only found for plaintiffs generally, without finding any compliance with the law in order to entitle them to purchase and receive a patent for the ground.

SECTION 618. And even where a plaintiff nowithstanding his want of standing as an adverse claimant, or

his want of title or legal compliance to entitle himself to the ground, has in fact gone to trial and obtained a verdict of no mineral discovery in the prior mining claim of defendant, he is still not entitled to his judgment or verdict, and he must be rejected because of such lack of interest, claim, or compliance on his part.

See cases cited in Section 228 ante.

Healey vs. Rupp, 86 Pac. 1015-1016.

CHAPTER XVIII.

THE JUDGMENT.

SECTION 619. Under assignment No. 61 (see 693), we complain that the judgment is wrong.

1. Because the complaint does not state facts sufficient to constitute a cause of action, as shown in assignment No. 1. This is covered by Chapter VII hereof.

2. Because the evidence is insufficient as shown in assignment No. 35. This is covered by Chapters II to X, inclusive.

3. Because it contains no findings of fact to inform and guide the Land Office in determining the right of possession, purchase and patent. This is practically covered by the decisions under the preceding Chapter XVII as to verdicts. But see also the decisions cited in the next section hereto.

4. Because the evidence shows a fatal misjoinder of parties plaintiff. See Secs. 52-60 ante.

5. Because the judgment does not give effect to defendant's title and right of possession by adverse possession under the federal and state statutes. See Chapter III ante.

SECTION 620. In aid of clause 3 in preceding section, we cite further:

The judgment in an adverse suit should be sufficient upon its face to enable the party in whose favor it is rendered to take it to the Land Office and have patent issued

upon it, and to that end it should correctly describe the claim to which the successful party is entitled, including the area in conflict.

1. Snyder on Mines, p. 624-6, citing:
   Becker vs. Pugh, 17 Colo. 243; 29 Pac. 173;
   Rosenthal vs. Ives, 2 Ida. 244; 12 Pac. 904;
   Rev. St. Sec. 2325.

SECTION 620a. It should also show the party to be entitled to the area in conflict by virtue of a prior location of his claim, and a substantial compliance with all the requirements of the Federal and State statutes and local rules.

1. Snyder, Mines, p. 624, note 2, citing:
   McGinnis vs. Egbert, 8 Colo. 41; 5 Pac. 652.

And all the facts constituting a valid location, such as citizenship of the party, the discovery of the minerals, etc., should be expressly found, whether admitted in the pleadings or not.

1. Snyder, Mines, 624, note 3, citing:
   Rosenthal vs. Ives, supra;
   Jackson vs. Roby, 109 U. S. 441; 27 L. Ed. 990;
   Lee Dean vs. Teah, 68 Cal. 43; 8 Pac. 621;
   McGinnis vs. Egbert, supra.

SECTION 621. *Relief Given in Judgment Below.* As we have seen (Secs. 234, 238-265 ante) this action was brought and tried as an action at law, with prayer for

restoration of possession of the premises, damages and costs. There was a failure to allege or prove any wrongful ouster or detention however, as we showed in Chapters VII, VIII and IX. On the contrary plaintiffs by some unaccountable lapse in pleading alleged that they have been *in possession* of the demanded premises ever since the ..... day of September, 1914. (Secs. 234, 242 ante.) It is not our intention to recapitulate the law or decisions already covered in those chapters, but refer thereto for pointing the proposition here stated.

The judgment of the court below followed the prayer of the complaint, rather than the allegations thereof and the proof, and undertook to give judgment to plaintiffs for *recovery of possession* of the premises demanded, viz:

"It is ordered, adjudged and decreed that plaintiffs *have and recover possession* of said Homestake Placer and the whole thereof in so far as it conflicts with or is intersected by the exterior boundaries of the Midas and Evening Star Lode Mining claims, such conflict being described as follows:" (Description.)

SECTION 622. The judgment was therefore wrong because it is not based upon the averments of the complaint, nor the proofs given.

SECTION 622a. *Effect of Errors Assigned.* The errors discussed are of a very fundamental nature, and without those errors, a verdict or judgment could not

have been rendered against us. Under the facts and settled law as determined by the highest court, the jury should not have been permitted to find against us. The facts could not be altered upon a new trial because they are evidenced by the sworn testimony and recorded deeds of our opponents, which could not be altered; and upon unquestioned facts and testimony as to initiation, conveyance and non-forfeiture of our lode locations.

Natural justice also confirms our title. The claims cost large sums, and we and our grantors have occupied and improved the same enormously,—over $100,000 in labor alone, besides material and other supplies. Our opponents have nothing invested except a little court costs, and a disposition to speculate on "futures." All the original jumpers or relocators have parted with their claims or shares in the enterprise, though the names of one or two remain for decorative purposes. Two of the plaintiffs (defendants in error) are attorneys who, by the contracts shown in Chapters I and II (Secs. 18, 21, 42, 46-51) came in for a ten per cent. of what their co-patriots could dig out of the ground while they were contending against us in court. The other defendants in error are office holders who have taken a shot at it, no doubt under the theory that they cannot lose very much and stand a chance to win a great deal. (Record pp. 393-4, 500.)

It is a little comic that they dealt without the abstracts, and really acquired nothing in the pretended conflicting placer locations.

ERROR IN DENYING MOTION FOR NEW TRIAL.

SECTION 622b. Under assignment No. 62, we complain of the order entered below denying our motion for new trial (Record p. 108). We are aware that the usual rule adhered to in this court is that error does not lie to such an order, but its merits may be investigated upon exception to the verdict and judgment itself, as to all matters of pleading and proof for which motions for new trial lay in the state courts.

But in view of the statement made by his Honor, Judge Deitrich, in his decision (Record No. 2952, page 102) that there was a conflict of evidence, or a preponderance, we desire to except specifically thereto, and to request that this court require that any alleged conflicting evidence be set forth with page citations to the records. Upon no possible theory can such conflict be contended for in connection with the points considered in Chapters II to IX hereof, and none has so far been contended to exist, and we have shown herein throughout Chapter X and Secs. 395-403 such conflict does not arise under Chapter X. If there is no conflict of testimony and no tetsimony to support the verdicts and judgment in respect of the matters considered in Chapters II to IX, then it is immaterial about Chapter X anyway, and even a verdict sustained by evidence as to the matters in Chapter X could not avail the plaintiffs anything (see citations in

Chapter V). Especially would it not avail them in view of the matters in Chapter II and Chapter III.

We realize, of course, the constraint his Honor was under in passing upon contested motion when sitting by interchange or designation for another Judge, and his reluctance to overrule or dissent from the view of the trial Judge. This constraint is quite evident from the decision itself. But we must except to the statement and insist that neither the record nor the occasion warranted the statement as to evidence.

CHAPTER XIX.

IN GENERAL. RELIEF ASKED.

SECTION 623. In preparing this brief, we have chosen the policy of predicating all legal propositions upon uncontested evidence and testimony, to the end there be no recourse to the law as to conflicting evidence or any evidence to support the verdicts upon appeal or error.

Under Chapter II, we have cited to the record only the plaintiffs' own testimony regarding their alleged title to the junior and conflicting Guy Davis relocation. Hence there can be no dispute as to the facts. For a complete want of any title, interest or right of action their adverse claim should be rejected, and they denied any status as parties or participants, and defendant awarded the right to proceed ex parte. Their estoppel to deny the validity of the prior Salt Lake No. 3 and consequent invalidity of their relocation is equivalent to and constitutes want of title in themselves to the ground, independent of the misjoinder of parties plaintiff in the action.

SECTION 624. Under Chapter III, we have cited all the testimony as to possession and working of the Salt Lake No. 3 lode claim since its location of February 2, 1897, by plaintiff in error and his grantors. That testimony is non-conflicting and undisputed. It follows only to apply the law, which means that we have a perfect and incontestible title by limitations under U. S. Rev. Stat.

Sec. 2332, which is construed as a statute of repose, putting a period to litigious questions, and barring all questions of fact relating to the particulars of the lode locations upon which plaintiffs seek to be heard.

SECTION 625. Under Chapter IV, we show a perfect prima facie mining location of the Salt Lake No. 3 on February 2, 1897, by our remote grantor, J. H. Clive. The discovery of mineral in each location is both testified to by John Jory and Joseph Jory, and is evidenced in law by the recorded location and admitted performance of all annual labor to date. A prima facie location is absolute as against a junior claimant until some fact is alleged against it in the complaint, sufficient to invalidate it. Nothing has been alleged, and nothing can be considered against it. Under the complaint, the plaintiffs could at most compare dates of their and our location of the ground, and abide the result, if even they could do that.

But even could they be considered as having a standing to litigate, and also a cause of action to invalidate the lode claims on the ground of no prior discovery, the second affirmative defense of our answer setting up title under U. S. Rev. St. Sec. 2332 is a complete reply and bar thereto. This defense was never questioned or demurred to until they objected to our requests for instructions on that subject.

SECTION 626. Under Chapter V, the placer de

posits belong to us, are situated on our ground, and were first discovered and exposed by us in a shaft costing $400 or $500 to bed rock in the canyon and being private premises were not the subject for discovery and location by others. Their entry was a trespass forbidden by law and no rights were acquired.

Chapter VI shows they have no standing as plaintiffs and no cause of action, because of preceding chapters.

Chapter VII shows the complaint insufficient to constitute a cause of action, and Chapters VIII to XI show the evidence insufficient, and the verdicts against the law.

SECTION 627. The remaining chapters show fatal errors of procedure in admitting illegal evidence, rejecting legal evidence preventing cross-examination and misdirection of the jury, as well as insufficient verdicts to base a judgment and an insufficient judgment to meet the requirements of U. S. Rev. St. Sec. 2325-2326 as amended and insufficient to determine the questions now required to be determined in the Courts as a basis for action by the U. S. Land Department.

SECTION 628. *General Relief.* Under the condioitns of this record, we are justified in asking for an absolute reversal of the judgment below, and that this court enter up a judgment for the plaintiff in error based upon the undisputed testimony, under Chapters III and IV especially of this brief; and that the adverse claim of defendants in error be rejected absolutely because of the

affirmative showing of no title or interest in them as to the alleged conflicting Guy Davis relocation, as shown in Chapter II embracing their own evidence only.

Or, if not so entitled, that the court below be instructed to grant the relief asked in the preceding paragraph, and that no further testimony shall be received from the plaintiffs below, defendants in error, because none can legitimately be offered to contradict or vary the particulars of their title as shown in Chapter II hereof, or our title as shown in Chapter III hereof.

That while the court below committed reversible error at the trial, yet as the uncontested facts give plaintiff in error title and show that defendants in error have none, that therefore plaintiffs in error is entitled to have his rights finally declared in this court, without the burdensome expense of another useless trial at *nisi prius*, and that all questions of law and fact be resolved for plaintiff in error by the judgment or decree of this court.

That in any event, should the court order a new trial upon evidence de novo, that this court determine the rules of evidence and of cross-examination and of jury instruction as prayed herein, to the end we be not prejudiced in like manner upon such new trial.

That we be adjudged to recover our costs from the defendant in error, both in this court and in the District

Court of Nevada. And for such other appropriate remedies and relief as to the court may seem just.

P. G. ELLIS,
Attorney for Plaintiff in Error, and Appellant,

NOTE.—Owing to the matters mentioned in Sec. 38 ante, of our statement, the assignments of error in this case set out below, are cited opposite each assignment number to the pages of printed record No. 2953, between the parties hereto, where the same are printed.

The citations under each assignment refer to the pages where the subject matter was transacted in the court below, and refer to the present record No. 2952, which are generally the same in both records, however, as the testimony is identical and paged the same in both both cases.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

GEORGE A. COLE, ED. MALLEY, GILBERT C. ROSS, J. J. HEALEY, GEORGE B. THATCHER, GUY DAVIS, WILLIAM FORMAN,
Plaintiffs,
vs.
JOSEPH RALPH,
Defendant.

No. 1872, Involving the Adverse of the Guy Davis Claim against the Salt Lake No. 3. (See Record 2953, Page 113.)

CHAPTER XX.

SECTION 629. ***Assignments and Specifications of Error.***

Comes now the defendant in the above entitled cause

or action, and says that the court committed manifest and prejudicial errors upon the trial hereof, and files the following assignments of said errors, upon which he will rely for the reversal of the judgment and decree of said court, upon review in the U. S. Circuit Court of Appeals, to-wit:

SECTION 630. *Assignment No.* 1. (In Record No. 2953, p. 113.)

The court erred in permitting the introduction of any evidence by the plaintiffs, because their complaint herein does not state facts sufficient to constitute a cause of action. Thus:

(a) The complaint does not allege that at the time of making plaintiffs' Guy Davis location, the ground included therein was either open or vacant, unoccupied, unappropriated, or public mineral lands of the United States.

(b) The complaint does not and cannot in this action put in issue the mineral or non-mineral character of the said ground.

(c) The complaint does not allege any ouster or detention of the said ground, wrongful or otherwise, by the defendant from the plaintiff; nor any wrongful detention at the time suit was begun.

(d) Because the complaint alleges no adverse filed in the U. S. Land Office having jurisdiction of said lands, by the plaintiffs, as required by law.

(e) The complaint alleges no facts showing a valid location by the plaintiffs or their grantors, nor any invalidity in defendant's prior location, the Salt Lake No. 3.

Before any evidence was introduced, the defendant at the trial objected to the introduction of any evidence by the plaintiffs because of such insufficiency, and the objection was overruled. To which ruling defendant excepted, and now assigns the same as error. Record, p. 213.

ERROR IN ADMITTING IMPROPER EVIDENCE FOR PLAINTIFFS.

SECTION 631. *Assignment No.* 2. (In Record No. 2953, p. 114.)

During the trial of said action the plaintiffs' witness D. S. Van Orman testified that in 1913 he discovered placer and made a location in Copper Canyon. He was then asked:

What did you call the claim? Ans. The Guy Davis Placer.

Defendant objected to any evidence pertaining to plaintiffs' mining claims and the location or discovery of mineral upon either of them, until it is first shown that the ground was at the time unoccupied and unappropriated public land.

The Court: If he fails to make that proof his testimony will be stricken out, but I will allow him to prove his case in his own way.

Defendant excepted on the grounds stated in the objection to the evidence, and to all that line of testimony, so it will not be necessary to repeat the objection.

Defendant assigns said ruling as error. Record, p. 227.

SECTION 632. *Assignment No.* 3. (In Record No. 2953, p. 115.)

Thereupon under said ruling, plaintiffs' witnesses Van Orman, Guy Davis and others, were permitted to testify to their making of the Guy Davis mining location, upon the ground covered by said prior Salt Lake No. 3 lode claim, without making any showing or giving any evidence that said ground was then vacant, unoccupied or unappropriated, but on the contrary, testifying affirmatively that when they entered on the ground to make said Guy Davis location they knew the said ground was held and claimed by defendant's grantor, the Glasgow & Western Exploration Co., under said Salt Lake No. 3 location, that they saw and knew of the boundary stakes, buildings, mill, leaching plant, roadway, old and new cuts and excavations, and other improvements on said ground, constructed and owned by said Glasgow & Western Co., including some recent development work thereon done by said Company, and knew of the presence

of an agent or employee of said Company then present and living in one of the houses on said ground, and having custody and supervision for the owner; and that with said knowledge they entered on the ground without the knowledge or consent of said owner or his agent on the ground, set down their stakes by the side of the stakes of said Salt Lake No. 3, and undertook to relocate practically the whole of said Salt Lake No. 3 under name of the Guy Davis lode claim, and the next day sought to amend and call the same the Guy Davis Placer.

All of said evidence as to the relocation of the ground under the Guy Davis claim was admitted by the court, over defendant's said objections and exceptions, that plaintiffs have not shown that the ground was vacant, unoccupied, and unappropriated public lands of the United States, and defendant assigns the admission of said evidence as error. Record pp. 228-230, 235, 237, 246-253, 263-264, 268-270, 399.

SECTION 633. *Assignment No.* 4. (In Record No. 2953, p. 116.)

During the trial of said action, plaintiffs offered in evidence their Exhibit B, being a location notice of the Davis Lode Claim, reciting that the locators, Guy Davis and Noah Faubert, have this Sept. 5, 1913, relocated what is called the Salt Lake No. 3 on the ground of failure to comply with the requirements of the law, said Salt Lake Claim being claimed by Glasgow Western Mining Co.

and that the claim shall be known as the Davis Lode Claim, (describing it, 1500 feet in length by 600 feet wide and 300 feet on each side of the discovery monument). Said Exhibit B was admitted by the court over defendant's objections that plaintiffs must first show the ground was vacant, unoccupied and unappropriated at the time of such location, and that plaintiffs are estopped by their relocation of the ground to deny the previous mineral character and validity of the lode claim.

Said objections were overruled and said Exhibit admitted in evidence; defendant excepted thereto, and assigns the ruling as error. Record pp. 236, 235.

SECTION 634. *Assignment No.* 5. (In Record No. 2953, p. 117.)

During the trial of said action plaintiffs offered in evidence their Exhibit C, Location Notice dated Sept. 6, 1913, reciting that the locators, Guy Davis and Noah Faubert, hereby make an amended location of the Guy Davis Lode Claim located on Sept. 5th, and located same as a placer (describing it same as in Exhibit B), and this claim shall be known as the Guy Davis Placer.

Said Exhibit C was admitted in evidence by the court over defendant's said objectionss that the ground is not shown to have been unoccupied or unappropriated, and that plaintiffs are estopped by their relocation to dispute the prior mineral character of the ground and the validity of the Salt Lake No. 3.

Defendant excepted to the admission thereof, and assigns the ruling as error. Record, p. 237, 235.

SECTION 635. *Assignment No.* 6. (In Record No. 2953, p. 117.)

During the trial of said action plaintiffs offered in evidence their Exhibit D, Location Certificate for the Guy Davis claim, reciting discovery, location, description, recording, etc., of the Guy Davis claim by Guy Davis and Noah Faubert; which Exhibit D was admitted in evidence by the court over defendant's objections and exceptions aforesaid, that plaintiffs have not shown the ground was vacant, unoccupied or unappropriated public land, and that they are estopped by their relocation to deny the validity of the prior location, or the mineral character of the ground. Defendant assigns the admission thereof by the court as error. Record, p. 268.

SECTION 636. *Assignment No.* 7. (In Record No. 2953, p. 118.)

During the trial of said action, plaintiffs asked their witness L. O. Ray, on the stand this question: "Q. Did you examine this Salt Lake No. 3—Guy Davis Placer, with reference to ascertaining whether there were any lodes or veins showing on it; and, what did you find?"

Defendant objected thereto as incompetent and immaterial, and because the plaintiffs having relocated the ground are estopped to deny the validity of the prior location or the mineral character of the ground. The court

overruled the objection; defendant excepted to said ruling, and now assigns the same as error.

And the defendant then asked: May we assume that objection will go to all the testimony they attempt to put in as to the non-mineral character of the locations?

The Court: Yes, that objection will go to all the testimony they attempt to put in as to the non-mineral character of the locations. Record, p. 256.

SECTION 637. *Assignment No.* 8. (In Record No. 2953, p. 118.)

During the further trial of said action plaintiffs' witness L. O. Ray was permitted to testify that on the hill on north side of Salt Lake No. 3 where the formation shows there are seams that might have mineral in it, but he found nothing to indicate a lode there; the Company has spent its big money elsewhere.

Said testimony was admitted by the court over defendant's objections and exceptions aforesaid, as incompetent and immaterial, and plaintiffs are estopped by their relocation to deny the mineral character of the ground or validity of the prior location, and the defendant assigns the admission thereof as error. Record, p. 257.

SECTION 638. *Assignment No.* 9. (In Record No. 2953, p. 119.)

Said witness L. O. Ray was then asked by plaintiffs: "Q. On the Salt Lake No. 3, after the examination you

made, did you see anything there, which, in your opinion, as a miner and prospector, would justify you in locating that as a lode mining claim?"

Defendant objected to the question as immaterial, and it is not evidence to show whether the ground is mineral in character or has a vein of mineral in place,—that is for the jury to determine and because it calls for the conclusion of the witness.

The court overruled said objection and permitted witness to answer. Defendant excepted to the ruling, and assigns the same as error.

Said witness then answered: "A. I would not as a prospector locate it for mining purposes." Record, p. 261-3; 256.

SECTION 639. *Assignment No.* 10. (In Record No. 2953, p. 119.)

Plaintiffs' witness Healey was then permitted to testify that he had been over the Salt Lake No. 3; that there was hard rock croppings at sundry places thereon, but there was nothing in his examination of the ground which in his experience as a miner he would call a lode or vein, or justify exploration or work.

Said testimony was admitted by the court over defendant's objections and exceptions aforesaid, as incompetent and immaterial, because plaintiffs are estopped by their relocation of the ground to deny the mineral character of the ground or validity of the prior location,

because the witness' opinion is not evidence as to mineral character, and as a conclusion of the witness.

Defendant excepted to the admission of the testimony, and assigns the same as error. Record, p. 294, 256.

SECTION 640. *Assignment No.* 11. (In Record No. 2953, p. 129.)

Plaintiffs' witness, Robert L. Phillips, was then allowed to testify that he had been over the ground in Salt Lake No. 3, and that he found nothing thereon to constitute a lode or ledge within his term of it as a miner.

Said testimony was admitted over defendant's objections and exceptions aforesaid, as incompetent, immaterial, mere opinion or conclusion of the witness, and plaintiffs estopped to deny the validity or mineral character of the ground in Salt Lake No. 3, by their relocation of it.

Defendant assigns the admission thereof by the court as error. Record page 335

SECTION 641. *Assignment No.* 12. (In Record No. 2953, p. 120.)

Plaintiffs' witness Emmett D. Boyle was then permitted to testify that he was familiar with portions of the Salt Lake No. 3,—Guy Davis ground, from spending part of two days in November, 1913, on this and other ground adjoining it; recalls going down wagon road on that claim; examined outcrop or formation exposed in the cut from the road to the mill, and exposure in set of

mill benches; recalls a fault containing crushed zone of quartzite which witness calls a fracture zone, from which he took samples which he delivered to local assayer Woodbury, and his assay certificates were put in evidence at a former trial. Took no other assays from that vicinity. While witness found what geologists would term a vein, he found nothing which as a commercial proposition he would locate with expectation of getting returns, or which as a mining man he would consider worthy of work or development.

Said testimony was admitted by the court over defendant's said objections and exceptions thereto as incompetent and immaterial to the issues, and because plaintiffs are estopped to deny the validity or mineral character of the ground in said Salt Lake No. 3 by their relocation of it, and said testimony are the witness' conclusions, which is for the jury, and not facts. Said objections and exceptions being overruled and said testimony admitted.

Defendant now assigns the same as error. Record, p. 392, 400, 401, 408-9, 256.

SECTION 642. *Asignment No.* 13. (In Record No. 2953, p. 121.)

During said trial, said witness Boyle was permitted to testify that he had reviewed his testimony on a former trial, and therefrom finds his "Sample No. 7" was taken from the lowest mill excavation on Salt Lake No. 3, that

he had it assayed for gold, silver and copper by Mr. Woodbury, assayer, and the assay certificates, showing the assay values thereof as None, None and Trace, were admitted in evidence as plaintiffs' Exhibits U and V. Said testimony and Exhibits U and V were admitted by the court over defendant's said objections as incompetent and irrelevant to the issues, and because plaintiffs are estopped by their relocation of the ground to deny the validity of the prior location, or the mineral character of the ground embraced therein. And defendant assigns the admission thereof as error. Record, p. 477-8-9, 480, 256.

SECTION 643. *Assignment No.* 14. (In Record No. 2953, p. 122.)

During the trial of said action, plaintiffs' witness Robert L. Phillips testified that within the last few weeks before the trial he had been over the ground of the Salt Lake No. 3,—Guy Davis Placer, the Midas and Evening Star, and had taken 12 samples from that ground of which the following were from Salt Lake No. 3 ground: Two samples No. 1 came out of shaft No. 1 above the wagon road; sample No. 2 just above the road, southeast of the shaft; sample No. 3 from cut No. "2;" sample No. 4 from cut No. "3," sample No. 5 from cut No. "4," with 5 other samples taken from the Midas and the Evening Star. Said cut Nos. 1, 2, 3, 4, referring to plaintiff's map, Exhibit A.

Said testimony was given and admitted under and subject to said general objection and exceptions of defendant as incompetent an irrelevant, and because plaintiffs by their relocation admitted the validity of the location and lode mineral character of the ground in Salt Lake No. 3. Said ruling in admitting said evidence is here assigned as error. Record, p. 476-478, 479, 480, 256.

SECTION 644. *Assignment No.* 15. (In Record No. 2953, p. 123.)

During the trial of said action, plaintiffs offered in evidence their exhibit A-4, an assay certificate by Woodbury, asayer, of two samples No. 2, furnished by Phillips from Salt Lake No. 3, showing values per ton in gold, silver and copper, of trace, and .63 cts. per ton respectively.

Said Exhibit was admitted in evidence over defendant's previous objections and exceptions to all this class of evidence, as incompetent and irrelevant to the issues, and because plaintiffs are estopped by their relocation of the ground to dispute the validity of the prior lode location, or the mineral character of the ground therein.

Said ruling admitting said certificate is now assigned as error. Record, p. 509, 510, 505, 256.

SECTION 645. *Assignment No.* 16. (In Record No. 2953, p. 123.)

During plaintiffs' rebuttal, on the trial of said action, plaintiffs further offered and put in evidence their Exhibits A-14 and A-15, assay certificates of the Robert

L. Phillips samples Nos. 1 and 3 from Salt Lake No. 3, and samples 1 to 6, left at the assay office by J. Healey, showing values per ton in gold and silver of trace, trace, and $1.34 per ton on said Salt Lake No. 3.

Said assay certificates were admitted under and subject to defendant's previous objections thereto and to all such evidence, as incompetent, irrelevant and immaterial, and because plaintiffs are estopped by their relocation of the ground to deny the lode mineral character of the ground, or the validity of said Salt Lake No. 3.

Said ruling admitting said evidence is now assigned as error. Record, p. 1190, 1192, 256, 1132-5, 1160-2.

SECTION 646. *Assignment No.* 17. (In Record No. 2953, p. 124.)

During the trial of said action plaintiffs offered in evidence their Exhibit L, purported copy of an alleged adverse said to be filed in the U. S. Land Office at Elko, Nev., by Noah Faubert, George B. Thatcher and Guy Davis, protesting and adversing the application by defendant for a patent for said Salt Lake No. 3 lode mining claim and sundry other claims therewith, and claiming the ground in said Salt Lake No. 3 as plaintiffs' under their Guy Davis location, by discovery and purchase, and setting out field notes of the alleged conflict.

Defendant objected to the admission of said Exhibit L, because it is not alleged in the complaint the plaintiffs filed any such adverse, and said Exhibit L is not an-

swerable to any of the allegations of the complaint. The court overruled said objection, and defendant excepted to the court's rulings, and now assigns the same as error. Record, p. 443, 440-2.

SECTION 647. *Assignment No.* 18. (In Record No. 2953, p. 124.)

During the trial of said action, plaintiffs offered in evidence their Exhibit N, a receipt by the U. S. Land Office at Elko, Nev., for Ten Dollars in connection with adverse plaintiffs Exhibit L, with a notice to said Thatcher, Faubert and Davis of the filing of said adverse and requirement to begin an action in 30 days to determine the right of possession.

Defendant objected to the admission of said Exhibit N for the same reasons and grounds given to the admission of Exhibit L.

Said objection overruled by the court, defendant excepted to the ruling and now assigns the same as error. Record, p. 467, 440-2.

ERROR IN FORBIDDING PROPER CROSS-EXAMINATION OF PLAINTIFFS' WITNESSES.

SECTION 648. *Assignment No.* 19. (In Record No. 125, p. 19.)

During the trial of said action, plaintiffs offered in evidence their Exhibit A-5, deed from George B. Tatcher

to J. J. Healey, for an undivided 1/10 interest in the Guy Davis Placer mining claim, dated May 24, 1915, and acknowledged on May 25, 1915, but not recorded, and which contained no U. S. Revenue Stamp, but the plaintiffs thereupon obtained and attached thereto and cancelled a 10-cent U. S. Revenue Stamp.

Defendant objected to the admission of said Exhibit A-5, on the ground that it did not at the time of its execution or at any time subsequent until the very last moment have attached to it or cancelled as required by law any U. S. Revenue Stamps and that it cannot now be validated without following the procedure required by the Act itself, and on the ground that the said deed is not properly stamped as required by law, and with the Revenue Stamps cancelled as required by the Act.

The court overruled said objection and admitted said Exhibit A-5 in evidence with a 10-cent U. S. Revenue Stamp attached.

Defendant excepted to the said ruling and now assigns the same as error. Record, p. 535, 502, 532.

SECTION 649. *Assignment No.* 22. (In Record No. 2953, p. 126.)

During the trial of said action Robert L. Phillips testified for plaintiffs that within the last few weeks he had taken 12 rock samples from the ground in the Salt Lake No. 3, Midas and Evening Star lode mining claims, of which a portion only were in evidence, in shape of assay

certificates showing small value or no value. He was then asked by defendant on cross-examination: "Now, of the samples that are not in evidence, were there any that returned values in assaying?"

Plaintiffs objected to this as not proper cross-axamination because in chief the witness had not been asked about the values of the omitted samples, but only that he took them; unless it be shown the cuts or excavations where taken, were actually on the ground at the time of the location of the Homestake, Salt Lake No. 3 claim.

The court sustained said objection and ruled: "I do not think any discovery which was made on the ground subsequent to a valid location made by the plaintiffs can be of any value to you. If last week you went on Salt Lake No. 3 and discovered ore worth $1,000 a ton I don't believe it would do you any good, if the plaintiffs made a valid discovery and location before you made this shaft. It is not a question whether there was mineral in the ground, the question is whether there was a discovery made, and if you discover anything there, no matter how rich, after a valid discovery and location by others, it does not avail you. For that reason I think the objection is well taken. I will allow you to question the witness as to any samples that were taken by him from openings or exposures that were in existence at the time these locations were made.

Defendant excepted to the rulings of the court, and now assigns the same as error. Record, p. 510-11.

SECTION 650. *Assignment No.* 23. (In Record No. 2953, p. 127.)

Thereafter during the trial of said action, and throughout said trial, the defendant was, pursuant to said ruling of the court, required and obliged to confine all his cross-examination of plaintiffs' witnesses, and all his questions to his own witnesses, relative to the lode mineral character of the ground in said Salt Lake No. 3 lode claim, to such openings and exposures as he could show to be in the same condition, at the time to which the question related, as at the time when said alleged Guy Davis conflicting location was made by plaintiffs on Sept. 5, 1913.

Which ruling and restriction by the court of the examination and cross-examination by the defendant, and the court's rulings compelling the same, were duly objected and excepted to by the defendant, and he now assigns the same as error.

And for the purpose of pointing this assignment of error, defendant refers to the bill of exceptions filed of record in this action, and prays that the same may be taken and considered by the court, as fully and the same extent and effect, as if the same were incorporated herein. Record, pp. 513-4-5-6-7-8-9, 520-1-2-3-4, 753, 758-9, 761-2-4-5-6-8-9, 770-2-3-4-5-6, 785-6, 798, 801-2-3-4-8-9, 811-

12-14-15-16-17-19, 820-21-22-24-25-26-28-29, 831-32-33-37-38, 842, 861-3, 893-4-5-6-7-8, 902-4-5-6-7, 911-15, 940, 957-8-9, 960-1-6-7-9, 970-1-2-3-8-9, 980-3-4-6-7, 993-4-9, 1132-3-4-5-6-7, 1051-2, 1120-1, 1139, 1140-1.

SECTION 651. *Assignment No.* 24. (In Record No. 2953, p. 128.)

Defendant then asked said Phillips on cross-examination: "Q. Do you know of your own knowledge that all these workings where you took the samples were in the same condition as they were when the placer claims were located? Ans. No; they are not in the same condition."

Defendant moves that all the assay certificates be stricken from the record, and taken from the evidence. The court declined or omitted to make such order. Defendant assigns the same as error. Record, p. 515.

SECTION 652. *Assignment No.* 25. (In Record No. 2953, p. 128.)

Thereupon defendant renewed his motion and moved the court to strike out all evidence as to values, particularly as to assays taken, because there has been no showing whatever that the condition was precisely the same at the time of the examination as at the time of the location of the placers.

The court: I didn't intend to make the ruling that broad. Suppose at the time the placer was located, in shaft No. 21, for instance, there was a depth attained of 10 feet; since then we assume you have sunk the shaft

to a depth of 40 feet; a sample taken within that 10 feet would be admissible because the ground was exposed; a sample taken from the bottom of that shaft was taken from ground which was not exposed at that time, and it seems to me would be inadmissible.

Mr. Springmeyer: It is evidential of the fact of a prior discovery if we show that at any time, whether since or prior to the location of the placers, there has been mineral discovery; and we say if your Honor rules that samples taken since the discovery or location of the placer claims is proof admissible to show there were no values and no mineral in place on the lode claims, then it would be admissible to show the contrary or opposite thereof.

The Court: That question is not presented. As I understand, Gen. Thatcher don't intend to offer any assays made from claimed lode formations not exposed prior to the placer locations, and if he had put in anything of that kind, it is a matter of inadvertence. In your your case it is for you to prove that there is mineral in the ground, and that before the placers were located you had discovered the mineral, and if the mineral was exposed at that time, we may safely presume if it was exposed in some of your workings that you had discovered it. I shall only admit assays, no matter when taken, but taken from a surface exposed prior to or at the time of the placer locations. Is that clear?

The defendant excepted to the ruling of the court, and now assigns as error the court's said rulings.

The Court: You have that exception. Your question is as to whether he had other samples. If he took samples from ground that was exposed, the ruling is that he must answer. If he took other samples from ground not exposed, my ruling is that he need not answer. And when you go into this matter again I think you better ask a question that will bring you strictly within the rule, or without the rule, as the case may be. Record, p. 517-19.

SECTION 653. *Assignment No.* 26. (In Record No. 2953, p. 129.)

Thereupon said witness Phillips testified that some of the cuts from which he took his rock samples have been changed somewhat since the location of the placers; that he took some of his samples from the old points; those in evidence from the old points as they existed at the time, but that witness was not in Copper Canyon when the placer claims were located, and knows only of any change made since November, 1913.

Defendant renews his motion to strike out the assay certificates and evidence concerning the values and samples.

Plaintiff offers to connect up with the testimony of Mr. Healey that the ground on these cuts on Nov. 22, or when he examined them the first time, that the cuts were

in the same condition as they were when the placer claims were located.

The Court: If that matter is not proven, it will have to go out. Defendant assigns the failure or postponement to rule on the motion as error. Record, p. 519, 524.

ERROR IN REFUSING TO STRIKE FROM PLAINTIFFS' TESTIMONY.

SECTION 654. *Assignment No.* 27. (In Record No. 2953, p. 130.)

During the trial of this action, and at the conclusion of plaintiffs' evidence in chief, the defendant moved the court to strike out from the record and the evidence, all portions of the testimony or evidence produced by the plaintiffs as to the absence of lodes, or the failure or inability of the witnesses to find or discover lodes or mineral bearing rock in place, upon or within the Salt Lake No. 3 lode mining claim, upon the ground that said evidence or testimony is immaterial, irrelevant, insufficient and inadmissible, and does not follow or tend to prove any of the averments contained in the complaint, and is not directed to any question before the court in plaintiffs' case in chief.

The court overruled said motion to strike, and defendant excepted to the ruling of the court on the grounds stated, and because the evidence offered is not within the

issues as presented; also because the complaint does not state facts sufficient to constitute a cause of action, nor to warrant the admission of proof. Record, p. 526, 533.

ERROR IN OVERRULING DEFENDANT'S MOTION FOR NON-SUIT.

SECTION 655. *Assignment No.* 28. (In Record No. 2953, p. 131.)

Upon the conclusion of plaintiffs' evidence in chief on the trial of this action, defendant moved the court for an order of non-suit, on the following grounds, to-wit:

1. That the complaint herein does not state facts sufficient to constitute a cause of action, or for an adverse; and fails to allege that the ground on which plaintiffs filed the Guy Davis location, was at the time thereof vacant, unoccupied or unappropriated public land of the United States; and fails to allege any adverse filed by plaintiffs in the Land Office.

2. Because sufficient facts have not been proved by the plaintiffs herein to entitle them to a verdict or judgment in their favor or any affirmative relief; and because plaintiffs' proof shows that they are entitled to no verdict, judgment or relief herein; and because insufficient facts have been proved to entitle the plaintiffs to go to the jury.

3. Because there is a fatal misjoinder of parties

plaintiffs herein, and as shown by the evidence, some one or more of the plaintiffs had no interest in the subject matter of the action at the time of the commencement of the action, and did not derive any title from the plaintiffs who, at that time, had any such title or right to protect.

4. Because there is a defect and non-joinder of necessary parties plaintiff.

5. Because the plaintiffs have not shown that the ground on which the Guy Davis location was located, was at the time of such location, vacant and unoccupied public land of the United States, but the proof shows the contrary.

6. Because the case made does not support the alleged adverse claimed to have been filed in the Land Office at Elko, Nev., as alleged in the complaint filed.

7. Because the plaintiffs are estopped to deny the mineral character of the ground upon which they filed their location in the case at bar.

8. Because the plaintiffs' evidence shows affirmatively that the lode location with which their placer conflicts, were at the time of the making and filing of said placer, occupied and held by the defendant and his predecessors in interest through their employees and agents, etc.

9. There is a variance between plaintiffs' pleading and proof as to the nature of the estate and title sought to be protected in this action.

There was no wrongful ouster or detention by defendant shown by said evidence.

The court overruled said motion for a non-suit. Defendant excepted to the ruling of the court upon each of the grounds contained in said motion; and now assigns said ruling as error. Record, p. 527-9, 531, 532-3.

ERROR IN EXCLUDING PROPER AND LAWFUL QUESTIONS AND TESTIMONY ON BEHALF OF DEFENDANT.

SECTION 656. *Assignment No.* 29. (In Record No. 2953, p. 133.)

During the trial of said action, the defendant asked his witness Joseph Jurey on the stand this question: "Q. Mr. Jurey, during the years that you were in the employ of the Company, state whether the men were paid for the work they performed on each of these claims, or whether they received wages for their general work?"

Plaintiff objected to said question as immaterial. The court sustained said objection and ruled: "It is the character of your possession, not the amount you pay, which makes it adverse; it is immaterial that you have paid large sums of money on this and other claims.

Defendant excepted to the ruling of the court, and now assigns the same as error. Record, pp. 658-659.

SECTION 657. *Assignment No.* 30. (In Record No. 2953, p. 133.)

During the trial of said action, defendant asked his witness Joseph Jurey this question on the stand: "Q. Do you know whether or not it was the idea of the management that the work on that tunnel would develop or enhance the mineral value of the Evening Star claim?" Plaintiffs objected to said question as to what the idea of the Company was, or what the Company thought. The court sustained the objection, and defendant excepted to said ruling, and now assigns the same as error. Record, pp. 669-670.

SECTION 658. *Assignment No.* 31. (In Record No. 2953, p. 134.)

During the trial of said action, defendant asked his witness Joseph Jurey this question on the stand: "Q. Do you know whether that vein or ore body was believed by the management to run through the claims involved in this controversy?" The witness answered: "Yes, sir."

Plaintiff objected to the question and moved to strike out the answer. The court sustained the objection, and struck the answer.

Defendant excepted to the ruling and asigns the same as error. Record, pp. 671-2.

SECTION 659. *Assignment No.* 32. (In Record No. 2953, p. 134.)

During the trial of said action defendant offered in

evidence the monthly payrolls of his grantor, the Glasgow & Western Exploration Co. for the period from April 30, 1898, down to August, 1913, showing a monthly expenditure for labor alone on Salt Lake No. 3 and adjoining claims of the Copper Canyon Group of from $154.00 per month at the lowest, to and in excess of $2,000 per month, said payrolls being itemized by names, employment, days, rate per day, and amount due, with signatures of the employees receiving said moneys, in columns, and the totals carried from month to month, and year to year, showing the labor expense per year, viz:

1898	$12526.27	1906	$ 1996.00
1899	13679.80	1907	11050.25
1900	8164.90	1908	6049.00
1901	2005.00	1909	12596.75
1902	2230.50	1910	2555.00
1903	1974.20	1911	2555.00
1904	1993.00	1912	26235.60
1905	1822.00	1913	14037.65
		Total	$120,460.94

And said payrolls showing, among others, these items:

NOAH FAUBERT.		GUY DAVIS.	
Dec., 1912	$71.75	Jan., 1913	$68.25
Jan., 1913	45.50	Feb., 1913	98.00
		Mar., 1913	56.85

And plaintiffs admitted the witness Jurey, now on the stand, knows and will identify all the signatures upon the payrolls.

Plaintiffs objected to the admission of said payrolls as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

The Court: I am much inclined to think so. You have not proven the amount of work done; you have not offered to show what fractional portion of the work represented by this payroll was done on these particular three claims, and I do not see it affords any assistance.

We have no standard. Even though you show you paid out ten, fifteen, twenty, or even fifty thousand dollars for work during three or four years, you don't show what portion of that work was done on these claims, so that it can be determined what amount of your money was paid for the specific and exact work done on these claims.

Mr. Springmeyer: We have shown on the contrary, it is impossible to do that.

The Court: Then that is your misfortune. I cannot see where it would be of the slightest assistance; it simply adds to the record, and to the confusion. * * * * I do not suppose there will be any question on the part of the plaintiffs but that the amount of work done on that group of claims exceeded one hundred dollars for each claim.

Mr. Thatcher: Oh, no.

The Court: The question is not the total amount of money which was expended, but how much was expended

on these three claims, or how much was expended for the benefit of these three claims; and if it is to go in at all, it seems to me you had as well agree on that without putting in that immense record.

Mr. Springmeyer: I can segregate it, if that is the only objection; we have the whole thing segregated for each year—the amount of wages paid to the employees of the Company. That does not include any supplies furnished; merely the wages paid to the men for labor on this group of claims. I make that offer, if the objection is to encumbering the record.

Plaintiffs renew and insist on their previous objection, whether it is segregated in years or not.

The Court: I will sustain the objection to the offer that is made, and you may take your exception.

Defendant excepted to the rulings of the court, and now assigns the same as error. Record, p. 682-7, 644-5-7; 649, 655, 656-8-9, 650, 673-4.

SECTION 660. *Assignment No.* 33. (In Record No. 2953, p. 137.)

During the trial of said action plaintiffs asked defendant's witness Joseph Jurey on cross-examination, this question: "Q. Well, from 1898 up to 1900, and the end of 1913, was the Salt Lake No. 3 ever worked as a mine?" A. "No, sir."

Mr. Springmeyer: Object to that as calling for a conclusion of the witness. He can testify to what the

work was, and let the jury determine whether it was worked as a mine or not. I move that the answer be stricken out; the witness answered while counsel's question was being put.

The court overruled defendant's objection, and defendant excepted to the ruling, and now assigns the same as error. Record, p. 691.

SECTION 661. *Assignment No.* 34. (In Record No. 2953, p. 137.)

During the trial of said action, defendant Joseph Ralph testified that he knew the cost of construction of the mill, leaching plant and other buildings and improvements placed on Salt Lake No. 3 lode claim in 1912 by his grantor, the owner thereof, because he paid the bills therefor himself. He was then asked: "What was the cost?"

The question was objected to by plaintiffs as incompetent and immaterial, because the cost of the leaching plant was not mining development work.

Mr. Springmeyer: We contend the mill was built for the purpose of working ores extracted in part from Salt Lake No. 3, Midas and Evening Star, because they were part of a group of claims operated under a general scheme of development. Each year a certain amount of work was done, sometime on a small scale, sometime on a tremendous scale.

The court sustained plaintiffs' objection; defendant

excepted to the ruling, and now assigns the same as error. Record, p. 954-55.

SECTION 662. *Assignment No.* 35. (In Record No. 2953, p. 138.)

During said trial, defendant Ralph was by his counsel asked this question on the witness stand: "Q. Do you know what was the cost of building the road on the Salt Lake No. 3 in the year 1913?"

Plaintiffs objected to the question unless it be shown the road tends to develop Salt Lake No. 3. Mr. Spring-Meyer: I think the showing is sufficient. The court sustained the objection and ruled:—"It does not seem to me that was done for development of that claim, or that that was its purpose.

Defendant excepted to the ruling, and now assigns the same as error. Record, p. 966-7.

SECTION 663. *Assignment No.* 36. (In Record No. 2953, p. 138.)

Thereupon said defendant Ralph having testified that the mill was designed and erected at that point upon a general principle tending to the economic import of the whole group, and that any mineral, whether on Salt Lake No. 3 or the more distant claims of the group, could not be disassociated from the erection of the mill and its purpose; the defendant thereupon renewed his offer to testify the cost of the mill.

Plaintiffs renewed their objection on the ground it

is not for the development of the claim within the statute.

The court sustained the objection; defendant excepted to the ruling and assigns the same as error. Record, pp. 967-8.

SECTION 664. *Assignment No.* 37. (In Record No. 2953, p. 139.)

During said trial defendant Ralph on the witness stand was asked by his counsel: "Did you pay anything for the bunk houses and office buildings built on Salt Lake No. 3 in 1912?" Ans. "Yes, sir."

Plaintiffs object because they do not constitute annual labor or development of a mine, nor improvements within the statute, unless used in connection with this mine.

The court sustained the objection, and asked counsel: "Your question is as to the value of the bunk houses?" Counsel: "Bunk houses and office buildings." The Court: "You may have your exception."

Defendant excepted to said rulings, and now assigns the same as error. Record, p. 1000 and 1002.

SECTION 665. *Assignment No.* 38. (In Record No. 2953, p. 139.)

During the trial of said action Joseph Jurey testified for defendant that he knew about certain houses, an office, boarding house and bunk houses built on the Salt Lake No. 3 in 1912-1913 by defendant grantor, the owner,

and was asked regarding them: "Q. What were they reasonably worth?"

Plaintiffs objected to said question on ground it does not tend to show any development of the claims in question as mining claims.

The court sustained the objection, and defendant excepted to the ruling of the court, and now assigns the same as error. Record, p. 1066.

SECTION 666. *Assignment No.* 39. (In Record No. 2953, p. 140.)

During said trial the defendant offered in evidence a certified copy of tax record, of the assessment and payment of taxes, on the office, boarding house and stable on said Salt Lake No. 3 lode mining claim, from the records of Lander County, Nevada, for the period of from 1904 to 1914, and also upon the mill building and leaching plant for the purpose of showing the good faith of defendant and his grantors, and the exercise of such rights of dominion as will entitle defendant to judgment by adverse possession.

Plaintiffs objected to said offer and the court sustained the objection. Defendant excepted to the ruling of the court, and the ruling is now assigned for error. Record, p. 1092.

SECTION 667. *Assignment No.* 40. (In Record No. 2953, p. 140.

During said trial, defendant's witness Benj. F. Tibby

having testified to observing a vein or lode in the shaft by the mill road on Salt Lake No. 3, extending to the surface at mouth of the shaft, and to the mill road surface, was then asked by defendant this question: "Q. What was the condition of the material there as to being a vein or otherwise?" And answered: "I say there that the vein is visible on both side in the bottom of the shaft, well defined walls, and soft heavily iron stained matter."

Plaintiffs objected and moved to strike out all that part of the witness' testimony with reference to the shaft; but if confined to exposures on the road, no objection.

Mr. Springmeyer: It is shown this vein goes right to the surface of the road.

The Court: Do you claim that as your discovery vein?

Mr. Springmeyer: No, we claim that vein was discovered and known to the owners of the claim prior to the location of these placers; but we don't claim that was the original discovery point of Salt Lake No. 3.

All the evidence we have on that point is by the Jory's themselves, who swore that they made a discovery and stepped it out, and that they stepped out the distance after the discovery was made.

Mr. Thatcher: I call your attention to the patent plat, and the mark called "Disc."; is that the point where you claim your discovery?

Mr. Springmeyer: That is the point on the location

notice and the location certificate, according to the testimony of the Jory's. You heard that as well as I did; that is all the evidence I have. It is 20 years since that discovery was made, and they testify they cannot locate the precise point.

The Court: I think for the present I will exclude the testimony as to what appeared in the bottom of the shaft. My theory is in admitting that sort of testimony, it is admitting a discovery that has been made since the placer discovery.

Defendant excepted to the court's ruling, and now assigns the same as error. Record, p. 902-4.

SECTION 668. *Assignment No.* 40-A. (In Record No. 2953, p. 142.)

During the trial of said action, defendant offered in evidence an asay certificate of an assay made by witness Parker Liddell from rock sample No. 1, from Salt Lake No. 3 lode claim, taken in cut "2" on map Plaintiffs' Exhibit A ("4" on Defendant's Exhibit 5), showing values in gold and silver or $2.43 per ton at said point, for the purpose of showing values in the vein or lode at said point.

Plaintiffs objected thereto as incompetent and immaterial, because taken at a point exposed since the initiation of the plaintiff's placer rights.

The court sustained said objection and excluded said

certificate. Defendant excepted to the ruling, and assigns the same as error. Record, pp. 814-821.

SECTION 669. *Assignment No.* 40-B. (In Record No. 2953, p. 142.)

During the trial of said action, defendant offered in evidence an assay certificate of an assay from rock sample No. 2, made by the witness Parker Liddell, taken from the same cut "2" as the rock sample No. 1, showing values of $1.53 per ton in gold and silver in the vein at said point, and the existence of said vein.

Plaintiffs objected thereto as incompetent because taken at a point exposed since the initiation of the Guy Davis claim. The Court sustained the objection and excluded said certificate.

Defendant excepted to the ruling, and assigns the same as error. Record, p. 823-824.

SECTION 670. *Assignment No.* 40-C. (In Record No. 2953, p. 142.)

During the trial of said action, defendant offered in evidence an assay certificate of an assay from two rock samples No. 4, made and taken by said Parker Liddell from a point, cut "1" on Salt Lake No. 3 (plaintiffs' map, Exhibit A), ("9" on defendant's Exhibit 5), from mineral-bearing rock in place exposed prior to September, 1913, and from vein matter 36 inches wide, showing values in gold and silver at said point of $1.37 per ton, to show values and existence of vein at said point.

Plaintiffs objected thereto as incompetent and irrelevant. The Court sustained the objection. Defendant excepted to the ruling, and now assigns the same as error. Record, pp 832-834.

SECTION 671. *Assignment No.* 40-D. (In Record No. 2953, p. 143.)

During said trial, defendant offered another assay certificate of rock sample No. 5, taken by said witness Liddell from the same cut "1" (plaintiffs' Exhibit A) on Salt Lake No. 3 lode claim, showing $0.82 per ton in gold and silver, for purpose of showing mineral values and existence of a vein at said point.

Plaintiffs objected thereto for the same reasons before given. The Court sustained the objection. Defendant excepted to the ruling and now assigns the same as error. Record, pp. 833-834.

SECTION 672. *Assignment No.* 40-E. (In Record No. 2953, p. 143.)

During said trial, Defendant Ralph testified to taking his rock sample No. 6 from said cut "2" on Salt Lake No. 3 (plaintiffs' Exhibit A) from a four-foot vein, and offered said sample in evidence, to show existence of said vein.

Plaintiffs objected thereto as incompetent, irrelevant and immaterial. The Court sustained said objection. Defendant excepted to the ruling, and now assigns the same as error. Record, pp. 972-974.

ASSIGNMENT OF INSUFFICIENCY OF THE EVIDENCE.

SECTION 673. *Assignment No.* 41. (In Record No. 2953, p. 144.)

The defendant now assigns the following grounds of insufficiency of the evidence to support or sustain the judgment and verdicts herein.

No Showing of Vacancy or Unoccupancy of the Ground.

1. The evidence was insufficient to show that the ground included within the boundaries of the relocated Davis lode claim (sometimes called the Guy Davis lode claim and Guy Davis placer), was at the time of such relocation vacant, unoccupied or unappropriated public land of the United States, subject to location.

2. On the contrary, the evidence shows affirmatively, positively, and without conflict, that at the time of such relocation, on September 5, 1913, the said ground was NOT vacant, unoccupied or unappropriated, but that said ground was at said time actually held, occupied, claimed and owned by defendant's grantors under location as the Salt Lake No. 3 lode mining claim, and had been so held, owned, occupied and claimed for more than sixteen years, duly staked, monumented, recorded, and improved, with all annual labor and assessment work duly performed and not subject to forfeiture; with val-

uable buildings erected and standing thereon, including a mill, leaching plant, office building, bunk house, pipe line, etc.; with sundry cuts, excavations, shafts and openings old and new, made thereon by said owners, costing many thousands of dollars, including recent development work thereon; and with the original boundary stakes and monuments still standing thereon to inform and warn trespassers; also one or more agents and employees of the owner residing and present on the ground, and living in one of the houses thereon, and having custody and dominion of the ground and improvements on behalf of the owner at the time of the alleged Guy Davis relocation.

3. The evidence shows affirmatively, positively and without conflict, that during the summer of 1913, and prior to the alleged relocation under which plaintiffs make claim to the ground, the Defendant Ralph, as agent of the owner, had caused to be sunk down to bedrock in the gulch on one part of Salt Lake No. 3, a shaft or shafts which disclosed valuable alluvial gold, constituting an additional element of value to said lode claim. That the relocators, Guy Davis and Noah Faubert, then residing near by, acquired knowledge of said "find" made in said shaft or shafts by defendant, and thereupon entered on the said ground without defendant's knowledge, in his absence, and excavated to the same bedrock at a point near by defendant's openings, but on defendant's ground, and uncovered the placer gold which

they knew in advance and had learned would be found there, and they thereupon pretended to have "*discovered*" placer gold, and thereupon pretended to relocate the said ground as the DAVIS LODE CLAIM (subsequently called Placer), 1,500 feet in length and 600 feet in width, adopting the boundaries of the Salt Lake No. 3, and setting down their own boundary stakes side-by-side with those of the Salt Lake No. 3 lode claim.

That said entry and attempted relocation was wrongfully, surreptitiously, and unlawfully made by said relocators, for the purpose an with the intention of depriving the owner of said grounds of the same and of the placer values therein, and that they succeeded in extracting over $1,000 in placer gold from the ground before they were stopped by injunction, as appears by their own testimony.

4. The evidence shows affirmatively, positively and without conflict, that within the boundaries of said Salt Lake No. 3 lode claim, at sundry points, there exist lodes or veins of mineral-bearing rock in place, containing values in gold, silver and copper sufficient upon which to base a valid location of the ground as a lode mining claim under the laws of the United States, and sufficient upon which to have entitled the locators of said Salt Lake No. 3 to make said location at the time it was located on February 2, 1897, and sufficient upon which to entitle any subsequent owner in the chain of title, to

hold the same as a lode mining claim. Also that there exists and did exist in and upon the ground, within said Salt Lake No. 3 at the time of the alleged relocation of the Guy Davis claim, certain old cuts, openings and shafts, half filled with dirt, wash and accumulation from the hillsides above, with sagebrush growing in the bottoms, indicating that said shafts, openings and excavations were quite old.

5. The evidence shows that, for the purpose of obtaining evidence upon which to destroy the prior Salt Lake No. 3 lode location, and to uphold a relocation or "jumping" of said ground, the said relocators went upon said ground at a time or times unknown to defendant's grantors or their representatives upon the ground, and pretended to make a search for lodes or veins at or upon the surface of said Salt Lake No. 3, and in some of the half-filled shafts and openings; that they never uncovered any surface soil, debris or obstructions at any point, nor removed any of the dirt or wash which had accumulated by drain from the hillsides, from out of the shafts, cuts or openings found on the ground, in which sagebrush had begun to grow, and did not make any bona fide effort to find a lode or vein; that notwithstanding the proved existence of lodes or veins at sundry points on said ground, containing mineral values in gold, silver and copper, sufficient to sustain a discovery and location of the ground, as shown by the evidence at the trial,

and other lodes or veins, the existence of which the defendant offered to prove, said witnesses pretended not to have seen any lodes or veins on the ground, nor anything which they would locate as such (with certain exceptions, where plaintiffs' witnesses admitted seeing seams or fissures which might contain mineral values); but that not seeing any vein or lode they took rock samples and had them assayed, also panned, without result.

6. That said relocation of the Guy Davis claim occurred on September 5, 1913, and that said several alleged examinations and searches for lodes or veins by plaintiffs' witnesses and said relocators occurred at or about the time of the relocation, some of them after the relocation had been in fact made or filed, and was done in hostility to the prior Salt Lake No. 3 lode location, in the effort and for the purpose of depriving the owner thereof, and not to sustain the same; and were done nearly seventeen years after the time of the location of said Salt Lake No. 3, and without any knowledge on the part of said witnesses of the original physical facts of said Salt Lake No. 3 lode location, or of the original mineral showings thereon, or mineral disclosures subsequent thereto, affecting the title to said Salt Lake No. 3, and without any effort to ascertain the same.

7. The evidence shows without conflict that the Salt Lake No. 3 is one of a group of about twenty con-

tiguous lode mining claims, which have been owned and operated as a group of claims for many years; that into the ground covered by said group have been sunk or drifted extensive workings, shafts, tunnels, adits, cross-cuts, drifts, etc., including one tunnel over 1,000 feet long, and another 300 feet long, some of said workings intended to develop all of said claims, and some for portions thereof, and some for local development; that the buildings and excavations are of very large value, and necessarily cost many thousands of dollars, or hundreds of thousands. That the purchase price of the Salt Lake No. 3 with fourteen other claims of said group on April 9, 1898, was sixty thousand dollars ($60,000.00). That most of the valuable buildings are on the Salt Lake No. 3; that the value of the placer deposits alone in said three lode claims (in the gulch), is $100,000; and that enormous values belonging to the defendant will thus be handed over to the claim jumpers, without consideration, if the verdict of the jury be upheld.

PRIOR ACTUAL POSSESSION.

8. The evidence shows affirmatively and without conflict that at the time of making of the alleged Guy Davis location, lode or placer, the defendant's grantors were in actual possession of the ground by his agents and employees, houses, improvements, stakes and monuments, and recorded location certificate, holding and

claiming to hold under the Salt Lake No. 3 lode mining claim.

PRIOR RECORD AND GOOD FAITH.

9. The evidence shows that the Salt Lake No. 3 lode mining claim was located on February 2, 1897, by one J. H. Clive, recorded February 6, 1897, and was conveyed by him in 1898 to the Glasgow & Western Exploration Co. and by mesne conveyances came to be vested in the defendant, and that the latter acquired in good faith in reliance on the record. That the defendant and his grantors have highly improved the property and made it valuable.

10. That the plaintiffs have no investment whatever in the alleged Guy Davis location, but they and their grantors and privies in interest have unlawfully taken from the ground more than one thousand dollars in placer gold belonging to the defendant, before they could be enjoined from further depredations thereon.

ESTOPPEL BY RELOCATION.

11. The evidence shows positively, affirmatively, and without conflict or dispute, that the said Guy Davis and Noah Faubert undertook to *relocate* the ground contained in said Salt Lake No. 3 lode mining claim, under the name of the Davis Lode Claim, thereafter called Guy Davis Lode Claim, and Guy Davis Placer, and that in their Notice of Location, they specified that the same

was a *relocation of the Salt Lake No. 3, claimed by the Glasgow Western Mining Company on the grounds of failure to comply with the requirements of law.* And that they are thereby estopped to deny the lode mineral character of the ground, or the legal validity of the said Salt Lake No. 3 lode mining claim.

MISJOINDER OF PLAINTIFFS.

12. The evidence does not show any joint or common estate, title, or right in all the plaintiffs, nor any joint or common right of action in all of the plaintiffs, in relation to the alleged Guy Davis Lode or Placer claim.

13. The evidence does not show any right, title or estate in any of the plaintiffs, to the said Guy Davis location.

14. The evidence does not show that all of the plaintiffs are or were represented in any adverse filed in any Land Office, or in support whereof, this action was begun or prosecuted. Some of the plaintiffs were not so represented.

15. Said evidence shows that some or all the plaintiffs have no interest whatever in the alleged Guy Davis location.

VARIANCE.

16. The evidence does not support the complaint in this, that the complaint alleges a joint and common

estate and right of action, but the proof shows that a portion of the plaintiffs, at most, have any appearance of claim or interest under the alleged Guy Davis location.

WRONGFUL OUSTER OR DETENTION.

17. This action was begun and prosecuted as an action at law, for possession ,in the nature of ejectment. But the evidence does not show ouster of the plaintiffs, wrongful or otherwise, from the ground by the defendant.

18. The evidence does not show a wrongful or unlawful detention of the ground from the plaintiffs, by the defendant, at the time of the beginning of this action, nor at all.

19. The evidence shows that some of the plaintiffs never were upon the ground, and that none of the plaintiffs were ever in the possession of the ground, but that some of the plaintiffs made transient, unlawful and secret intrusions upon the ground without the defendant's knowledge or consent.

DISCOVERY IN SALT LAKE NO. 3.

20. There was no lawful evidence to show that a discovery of a vein or lode of mineral-bearing rock in place, sufficient to sustain the Salt Lake No. 3 lode location, had not been made therein, prior to the time of the alleged Guy Davis relocation on September 5, 1913.

21. The evidence shows sufficiently and affirmatively that such discovery had been made in said Salt

Lake No. 3 lode mining claim prior to the attempted relocation thereof. under the Guy Davis claim.

ADVERSE POSSESSION BY DEFENDANT

22. The evidence shows positively, affirmatively, and without dispute, that the defendant and his grantors had been in the open, notorious, exclusive, adverse possession of said ground, under the Salt Lake No. 3 lode mining claim, for more than two years prior to the time of the alleged relocation of the ground by or under the Guy Davis relocation; indeed, since February 2, 1897, holding and working the same in the usual way in the vicinity thereof, which is sufficient to vest title and establish a valid location, under U. S. Rev. Stat. Sec. 2332 and Nev. Comp. Laws 1912, Sec. 4951.

23. That by virtue of such title by adverse possession, the plaintiffs are barred of any inquiry relating to the regularity of the original acts of location, or the sufficiency thereof to initiate title and right of possession to said Salt Lake No. 3 lode mining claim.

NO TITLE OR RIGHT OF POSSESSION BY THE PLAINTIFFS.

24. The evidence shows affirmatively and without conflict that the plaintiffs never made a discovery within the ground claimed under the alleged Guy Davis relocation, but that they attempted to appropriate merely, that

which they knew was there and had been already discovered and exposed by the defendant.

25. The evidence shows without conflict that all the placer values in the ground claimed to have been relocated upon, were within the Salt Lake No. 3 lode mining claim, and belongs to the defendant as owner of said lode claim, and were not in law subject to entry, location, discovery or appropriation by the plaintiffs, or any one else.

26. The evidence shows that the said relocators, Guy Davis and Noah Faubert, entered upon the ground as trespassers merely, without shadow of legal right or authority, and that all their alleged acts of discovery and relocation are void, and no title or right of possession of the ground was obtained thereby.

ERROR IN REFUSING INSTRUCTIONS REQUESTED BY THE DEFENDANT.

SECTION 674. *Assignment No.* 42. (In Record No. 2953, p. 153.)

After the close of all the evidence, and prior to the argument to the jury, the defendant requested and moved the Court in writing to peremptorily instruct the jury to return a verdict in favor of defendant, in the following words, viz.:

"The Court instructs the jury to find a verdict herein in favor of the defendant."

The defendant now refers to the Bill of Exceptions heretofore filed in this cause, and prays that for the purpose of pointing the error herein complained of, the same may be considered herein incorporated in its entirety as fully as though herein reiterated in haec verba.

The Court at said time overruled defendant's motion and request, and to instruct the jury as requested by defendant; and defendant excepted to such refusal, and now assigns the same as error. Record, pp. 1208, 1237.

SECTION 675. *Assignment No.* 43. (In Record No. 2953, p. 153.)

Prior to the argument to the jury, defendant in writing requested the Court to give to the jury the following instruction, viz.:

"The Court instructs the jury that if you find from the evidence that the defendant and his grantors had entered and held possession of the lode mining claims involved in these actions, and worked the same in the usual and customary way in the vicinity thereof, for a period of two years prior to the making of the placer locations of the plaintiffs, then the law presumes in aid thereof, that all the acts necessary to a valid location of said lode mining claims had been done and performed at the time of such lode mining locations, and that such possession (having the legal effect of a location under the law) is sufficient to give the defendant's grantors a lawful right to the possession of said mining claims, if kept alive as

required by law, as against the subsequent placer locations of the plaintiffs' grantors."

The Court denied said request and refused to give said instruction, to which the defendant called the Court's attention and excepted and now assigns said ruling as error.

There was evidence without conflict that defendant's grantors had held possession of the ground in dispute under the Salt Lake No. 3 lode location, in the usual way with mining claims in the vicinity thereof, with all annual labor performed, for more than two years prior to the alleged Guy Davis location by plaintiffs, and of all the facts covered by the instruction asked. Record, p. 1240.

SECTION 676. *Assignment No.* 44. (In Record No. 2953, p. 155.)

Prior to the argument to the jury, defendant requested the Court, in writing, to give the following instruction to the jury:

"The Court instructs the jury that proof of two years open, adverse, continuous and exclusive possession of lode mining lands under claim of right by a claimant, as a lode mining location, and during such time working the same in the usual and customary way of working such mining claims in the vicinity thereof, has all the force and effect and is the full legal equivalent of all the acts and things necessary to be done to initiate a valid location of such lode mining claim. And if you

find from the evidence in this case, or these cases, that the defendant and his predecessors had been so in adverse possession of the Salt Lake No. 3, Midas and Evening Star lode mining claims, or either thereof, for such period of two years at any time prior to the attempted locations of the Homestake and Guy Davis placers, respectively, then the defendant's grantor or grantors was a lawful locator by virtue of such adverse possession and working, at the expiration of said period of two years, independent of any other act or acts of location."

There was evidence without conflict that defendant's grantors had held possession of the ground in dispute under the Salt Lake No. 3 lode location, in the usual way with mining claims in the vicinity thereof, with all annual labor performed, for more than two years prior to the alleged Guy Davis location by plaintiffs, and of all the facts covered by the instruction asked.

The Court refused to give said instruction to the jury, to which ruling defendant duly excepted and called the Court's attention, and now assigns the same as error. Record, pp. 1211-1212, 1237, 1240.

SECTION 677. *Assignment No.* 45. In Record No. 2953, p. 156.)

Prior to the argument to the jury, defendant requested the Court in writing that the Court give to the jury the following instruction, viz.:

"When possession is proved to have once existed,

the law presumes that it continues until the contrary is established by a preponderance of the evidence. Accordingly, if you believe that the grantors and predecessors in interest of the defendant, located and went into possession of the Salt Lake No. 3 lode claim on February 2, 1897, then you may find that the defendant was in possession at the time plaintiffs or their grantors or predecessors in interest located the Guy Davis placer claim in 1913, unless the contrary be shown by the preponderance of the evidence."

There was evidence of entry and possession under location on February 2, 1897, of the Salt Lake No. 3, and possession and working thereon thereafter, by defendant's grantors, applicable to this request.

The Court refused to give said instruction to the jury, to which ruling defendant called the Court's attention and excepted, and now assigns the same as error. Record, pp. 1212, 1237, 1240.

SECTION 678. *Assignment No.* 46. (In Record No. 2953, p. 157.)

Prior to the argument to the jury, defendant requested the Court in writing that the Court should give to the jury the following instruction, viz.:

"The Court instructs the jury that it is not necessary to the exercise of lawful possession by the defendant and his grantors over the lode mining claims involved in this action, the Salt Lake No. 3, Midas and the Even-

ing Star, that they or their agent or employee should reside or remain continuously upon each of said lode mining claims during all of the time of such possession, but it is sufficient if the defendant or his grantors, his or their agent or employee, were in position to and did have such supervision, dominion or control over said mining claims as their nature admits of, and such as is usual and customary with the owners of like property in the vicinity thereof."

There was evidence of supervision, dominion, control and improvements on the Salt Lake No. 3 lode mining claim by defendant's grantors, and of the other facts covered by this request.

The Court refused to give said instruction to the jury, to which ruling and omission defendant called the Court's attention and excepted, and now assigns the same as error. Record, pp. 1214, 1237, 1240.

SECTION 679. *Assignment No.* 47. (In Record No. 2953, p. 157.)

Prior to the argument to the jury, defendant requested the Court in writing that the Court should give to the jury the following instruction, viz.:

"The Court instructs the jury that if you find from the evidence that the defendant and his grantors were in possession under valid locations of their lode mining claims involved in these actions, either by way of adverse possession and working, or by virtue of a compli-

ance with the laws for initiating such lode mining locations, that such possession relates to all the ground covered by and included within the exterior side and end lines of said locations as denoted by the boundary monuments upon the ground relating to each claim respectively, during all the time that such possession continued, and not to any less portion of said claim or claims."

There was evidence of facts constituting valid location and title of the Salt Lake No. 3, in each of the ways suggested in this request.

The Court denied said request and refused said instruction, to which defendant called the Court's attention and excepted, and now assigns the ruling as error. Record, pp. 1214, 1237, 1240.

SECTION 680. *Assignment No.* 48. (In Record No. 2953, p. 158.)

Prior to the argument to the jury, defendant requested the Court in writing that the Court should give to the jury the following instruction, viz.:

"The Court instructs the jury that if at the time of the initiation of the lode mining claims or locations herein involved by defendant's grantors, or at any time thereafter prior to plaintiffs' placer locations, mineral-bearing rock in place was discovered on said lode mining locations by the locators or owners thereof, but at some point not midway between the side lines thereof, but east or west from such center line, and the required amount

of location work was performed thereon according to the law at the time thereof, as elsewhere instructed, and the owners held adverse possession of said claims according to the boundary monuments upon the ground for two years prior to plaintiffs' placer locations, then the Court instructs you that such adverse possession related to all the ground embraced within the exterior lines of said locations as monumented, and it is immaterial to the rights of the defendant and his grantors, where the point of discovery within such exterior lines was or occurred."

There was evidence of all the facts contemplated in this instruction, and both at and away from the center line of the Salt Lake No. 3.

The Court refused to give said requested instruction, to which defendant called the court's attention and excepted, and now assigns such refusal as error. Record, pp. 1218-1219, 1237, 1240.

SECTION 681. *Assignment No.* 49. (In Record No. 2953, p. 159.)

Prior to the argument to the jury, defendant in writing requested the Court to give to the jury the following instruction, viz.:

"The Court instructs the jury that if you find from the evidence that at the time of the entry and making by the plaintiffs or their grantors, of the Homestake Placer and the Guy Davis Placer, the defendant or his grantor was in possession of the ground, or any portion thereof,

covered by such placer locations or filings, under and by virtue of prior location or locations, as lode mining claim or claims, and the performance of annual labor or improvements thereon during the same or the preceding year according to the legal requirements as elsewhere herein explained to you, then you are instructed that the entry thereon and the making of said placer locations was unlawful and void, that the same were in law trespasses on the rights and possession of the defendant; that all their steps of alleged discovery of minerals, the posting or recording of notices, or the monumenting of said placers were ineffectual; and that the plaintiffs, and their grantors, acquired no rights whatever by reason of said placer locations."

There was evidence of actual prior possession of the ground in dispute herein by defendant's grantors, and of all the facts suggested by this request.

The Court denied said request and refused to give said instruction, to which the defendant called the Court's attention and excepted, and now assigns said ruling as error. Record, pp. 1220-21, 1237, 1240.

SECTION 682. *Assignment No.* 50. (In Record No. 2953, p. 160.)

Prior to the argument to the jury, defendant in writing requested the Court to give to the jury the following instruction, viz.:

"The Court instructs the jury that in case No. 1873,

now on trial, involving the adverse by the owners of the Guy Davis Placer against the patenting of the Salt Lake No. 3 lode mining claim, the original plaintiffs who began and prosecuted this action and who alleged that they filed the adverse in the U. S. Land Office at Elko, Nevada, were Guy Davis, Noah Faubert and George B. Thatcher.

"That at the time this trial opened, the following-named parties were upon plaintiffs' application, substituted as parties plaintiff, in place of said named original plaintiffs, viz.: George A. Cole, Gilbert C. Ross, J. J. Healey, Guy Davis, George B. Thatcher and William Forman.

"The Court instructs you that unless each and all of the present parties plaintiff, above named, were either interested in said Guy Davis Placer mining claim, as the owner of undivided interests therein at the time when this action was begun, on September 30, 1914, and also joined in filing the adverse aforesaid, in the U. S. Land Office at Elko, Nevada, in support thereof this action was begun; or else, that they, the present plaintiffs, or such of them as were not original adversing plaintiffs, aforesaid, have since this action was begun purchased or acquired an undivided interest in said Guy Davis Placer mining claim, from one of the original adversing plaintiffs since the beginning of this action on September 30, 1914, then none of the plaintiffs can recover in this action.

If some of the present plaintiffs were neither adversing plaintiffs at the beginning of the actions, and have not since the beginning of this action purchased an undivided interest from one of the adversing plaintiffs, then you cannot find a verdict in favor of any of the parties plaintiff to this action."

There was evidence that some of the plaintiffs, J. J. Healey and William Forman at least, have no interest whatever in the alleged Guy Davis location, can trace none to the locators, and took no part in any Land Office adverse.

The Court denied said request and refused to give said instruction, to which the defendant called the Court's attention and excepted, and now assigns said ruling as error. Record, pp. 1222, 1237.

ERROR IN INSTRUCTING THE JURY.

SECTION 683. *Assignment No.* 51. (In Record No. 2953, p. 162.)

The Court erred in giving the following instructions to the jury:

"The locators of the placer claims, the Guy Davis and Homestake, have each performed all of the acts necessary and required by the statutes of the United States and the laws of the State of Nevada in the discovery and location of a placer claim. If you find from the evidence

and the instructions of the Court that no valid location was made on the Salt Lake No. 3, your verdict must be for the plaintiffs as to the Guy Davis placer. If you find from the evidence and the instructions of the Court that no valid location was made on the Midas and Evening Star lodes, your verdict must be for the plaintiffs for the Homestake placer."

This was error because the Court thereby assumed the validity of the alleged acts of discovery and location of the Guy Davis mining claim, which is contradicted by the evidence and the law of the case; ignores defendant's title and rights by adverse possession and prior actual possession of the ground; ignored the evidence of failure of proof of title and right of action in the plaintiffs; misjoinder of parties plaintiff; estoppel of plaintiffs to question the validity of the Salt Lake No. 3; and absence of wrongful ouster or detention by defendant.

The defendant objected and excepted to said instruction, and called the Court's attention thereto, and the defendant now assigns the giving of said instruction as error. Record pp. 1234, 1237–12 39–40

SECTION 684. *Assignment No.* 52. (In Record No. 2953, p. 163.)

The Court erred in giving the following instruction to the jury:

"The laws of the United States require as one of the essential conditions of the making of a valid location

of unappropriated public lands of the United States under the mining laws, a discovery of mineral within the limits of the claim, and the exclusive right of possession is conferred only on one who has made a valid location, one of the essentials of which is a valid discovery. Prior to such discovery mineral land is in law vacant and open to exploration and location. The actual possession of the prior arrival will be protected to the extent needed to give him room for work, and to prevent probable breaches of the peace; but while he is thus protected his possession must yield to the actual location on a valid discovery made by one who has located peaceably, and neither clandestinely nor with fraudulent purposes. Parties may not go upon the public domain and acquire the exclusive right of possession by the mere performance of acts prescribed for location, in the absence of a valid discovery."

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error.

There was no evidence of facts to sustain this instruction; no evidence that defendant's rights were based on or limited to mere entry without discovery or location, but the proof shows his rights were based on a perfected location, and prior actual possession, ripened into title by adverse possession for more than two years;

there was no evidence that plaintiffs' entry was lawful or peaceable, but the evidence shows that such entry was secret and clandestine, without the knowledge or consent of the owner or possessor of the ground. Because the Court should not instruct upon an hypothesis not presented by competent and conflicting evidence within the issues. Record, pp. 1232, 1237—8-7-1940

SECTION 685. *Assignment No.* 53. (In Record No. 2953, p. 164.)

The Court erred in giving the following instruction to the jury:

"A competent person may go on the public domain of the United States with a bona fide intention of making a discovery of mineral, and may define the boundaries of his claim by means of notice and monuments thereon, and so long as such locator is in the actual possession of his location so defined, endeavoring to make a discovery, he will be entitled to the peaceable possession of such claim as against one entering thereon as a treaspasser; but in the absence of a discovery should he permit another competent person to go peaceably upon the claim and should such person make a valid discovery of mineral and locate the same, and in all things comply with the requirements as to monumenting, posting notice and recordation, then such subsequent locator would acquire the title to such claim so located, subject only to the paramount title of the United States. Of course, it will

be necessary for him to comply with all of the Nevada statutes and regulations, which fix the manner in which a claim shall be located."

This was error because inapplicable, there being no evidence that defendant's grantor's prior possession rested on intention to locate and absence of discovery, or that he or they permitted plaintiffs to go peaceably on the ground, or to make a discovery or location thereon; ignores defendant's rights and title by adverse possession for more than two years, and by prior actual possession of the ground. The Court should not instruct but upon competent and conflicting evidence within the issues.

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error. Record, pp. 1233-1234, 1237-8-9, 1240

SECTION 686. *Assignment No.* 54. (In Record No. 2953, p. 165.)

The Court erred in giving the following instruction to the jury:

"A number of assay certificates have been introduced. Some question was made as to whether such certificates could be admitted with reference to cut No. 2, on the Salt Lake No. 3. You will remember there was a conflict in the testimony as to whether Mr. Ralph actually discovered a vein in that cut; it is for you to

determine whether he made an actual discovery there before the placer claims were located. If you find that he did actually discover such a vein before that time in cut No. 2, and you must understand also that a discovery means that he appreciates it; you stumble over a purse without knowing there is a thousand dollars in it, and go on, you haven't discovered anything; but if the thousand dollars is there and you know it, then you have made a discovery; so, if a man stumbles over a claim without appreciating what it is, or knowing what it is, or thinking of what it is, he has made no discovery. He must believe and realize that he has found something, and discovered such a vein as I have indicated.

"If you find such a discovery was made, then you will be permitted to go further, and consider the assay certificates. In determining whether he made a discovery, you have a right to consider his actions, and what he said, and what he did not say."

Said instruction is erroneous because the Court misconstrued the legal effect of the evidence of mineral exposure and mineral showing at cut "2" on Salt Lake No. 3, and in stating there was a conflict in the testimony on said subject, and in failing to admit the assay certificate without the qualification stated, and as elementary in proving the original discovery on said claim; and the Court should not instruct upon an hypothesis not presented by the evidence. The defendant objected

and excepted to said instruction, and called the court's attention thereto; and the defendant now assigns the giving of said instruction as error. Rec p. 1231, 1237-8-9, 1246

SECTION 687. *Assignment No.* 55. (In Record No. 2953, p. 167.)

The Court erred in giving the following instruction to the jury:

"It is not sufficient to constitute a discovery within the meaning of the requirements of the law concerning lode claims that the locator would be willing to expend his time and money in developing it. Willingness, unless evidenced and followed by actual exploitation, would be a mere mental state, which could not be satisfactorily proved. The facts which are within the observation of the discoverer and which induced him to locate should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in developing the property."

This was error, because inapplicable to the evidence, and no evidence to which to apply the same; there being no sufficient evidence of the facts which were within the observation of the Salt Lake No. 3 discoverer, or which induced him to locate, or from which to judge whether the locator acted prudently in locating the ground, or expending his time and money. The Court should not instruct upon an hypothesis not presented by the evidence. Ignores defendant's rights and title by

adverse possession and actual prior possession of the ground.

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error. Record, pp. 1232, 1237-8-9, 1240.

SECTION 688. *Assignment No.* 56. (In Record No. 2953, p. 168.)

The Court erred in giving the following instruction to the jury:

"In order to constitute a valid location of the Salt Lake No. 3, the defendant in this case must have made a discovery of mineral-bearing rock in place therein, and must have placed at or in such reasonable proximity to the discovery to give notice to all comers, a location monument, and posted a location notice thereon, and defined the boundaries of said claim by monuments readily traceable on the ground. All of these acts must have been performed by the defendant prior to the entry and location by the plaintiffs in this action."

This was error, because the Court assumes there was evidence of absence of a prior mineral discovery in the Salt Lake No. 3 lode mining claim, and the other acts of location, when there was not; and the Court should not instruct upon an hypothesis not presented by the evidence; and it ignores defendant's rights and title by

more than two years' adverse possession, and prior actual possession of the ground.

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error. Record, pp. 1228, 1237. 8-9, 1240

SECTION 689. *Assignment No.* 57. (In Record No. 2953, p. 168.)

The Court erred in giving the following instruction to the jury:

"In order to constitute a valid discovery on a lode mining claim, three elements are necessary: There must be a vein or lode of quartz or other rock in place; the quartz or other rock in place must carry gold or some other valuable mineral deposit; and the two preceding elements, when taken together, must be such as to justify a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. You are therefore instructed that even though you may believe and find from the evidence that the grantors of defendant made a discovery of a vein or lode on the Salt Lake No. 3, yet if you further believe and find from the evidence that such vein or lode so discovered did not carry gold or some other valuable mineral deposit in such quantities as to justify a prudent man in the expenditure of his time and money in the effort to develop a mine, then you will find the issues in favor of the plaintiff."

This was error, because the facts and conditions as to mineral discovery in Salt Lake No. 3 are not all in evidence, and the Court should not instruct upon a partial or incomplete record of that matter, or upon an hypothesis not presented by the evidence; and because the Court ignores defendant's rights and title by adverse possession for more than two years.

The defendant objected and excepted to said instruction, and called the Court's attention thereto; and the defendant now assigns the giving of said instruction as error. Record, pp. 1230-1231, 1237. 8-9, 124 D.

SECTION 690. *Assignment No.* 58. (In Record No. 2953, p. 170.)

The Court erred in giving to the jury the following instruction:

"Practically the only attack which has been made on the placer claims is that they were located on ground not open to location at the time."

This was error because it minimizes to the jury an objection so serious and vital that it went to the entire invalidity of the alleged Guy Davis location, and also the objection that plaintiffs are estopped to question the prior location.

The defendant objected to said instruction, and excepted thereto, and assigns the giving thereof as error. Record, pp. 1225, 1237.

SECTION 691. *Assignment No.* 59. (In Record No. 2953, p. 170.)

The Court erred in giving to the jury the following instruction:

"Practically the only question involved is the question as to whether a valid discovery had been made by the lode locators prior to the time when the placer locators went on the ground."

This was error because it suggests a question as to valid discovery in the prior lode location not lawfully arising upon the evidence; because it ignores defendant's title by adverse possession; plaintiffs' estoppel to question it; misjoinder of parties plaintiff; and absence of unlawful ouster or unlawful detention by defendant.

The defendant objected to said instruction, and excepted to the giving thereof, and assigns the giving thereof as error. Record, pp. 1225, 1237-8-9, 1240.

SPECIFICATIONS OF PARTICULARS WHEREIN THE VERDICTS ARE CONTRARY TO AND AGAINST THE LAW.

SECTION 692. *Assignment No.* 60. (In Record No. 2953, p. 171.)

1. That the general and special verdicts, and each thereof, are contrary to and against the law, in each and

every one of the particulars wherein it has been above specified, under Assignment No. 41, that the evidence is insufficient to support, sustain or justify the verdict.

2. That the said general and special verdicts, and each thereof in this case, are severally insufficient in form and substance upon which to base any judgment, or award any relief whatever against the defendant, or in favor of the plaintiffs herein.

3. That there is no finding therein of any facts or set of facts, sufficient upon which to enable the Land Department of the United States to determine which, if either, of the parties to this action are entitled to purchase the ground in dispute from the United States. Record, pp. 33, 1241-1244.

SPECIFICATIONS OF PARTICULARS WHEREIN THE JUDGMENTS ARE CONTRARY TO AND AGAINST THE LAW.

SECTION 693. *Assignment No.* 61. (In Record No. 2953, p. 171.)

1. That the judgment is against the law because the complaint herein does not state facts sufficient to constitute a cause of action, said complaint being insuf-

ficient in each of the particulars hereinbefore specified under Assignment No. 1.

2. That the judgment is against the law, because the evidence herein is insufficient to support, sustain or justify the same, in each of the particulars herein specified under Assignment No. 41.

3. That the judgment is contrary to law, because the same contains no sufficient findings of fact to inform and guide the Land Department of the United States in its determination as to which if either of the parties to this action are entitled to purchase the ground in dispute from the United States.

4. Because the evidence shows there is a fatal misjoinder of parties plaintiff in this action.

5. Because the plaintiffs' evidence shows they are estopped to deny the validity of the prior location of the Salt Lake No. 3 and defendant's right of possession thereunder.

6. Because the judgment and proceedings had prior thereto by the Court fail to give effect to defendant's title and right of possession of the ground acquired by adverse possession for the period of the State and Federal statutes of limitation, to-wit, for two years and more. Record, pp. 35, 1228, 1243-1244.

SECTION 694. Wherefore, the said defendant Joseph Ralph, prays that the judgment of the District

Court of the United States in and for the District of Nevada, entered herein in favor of the plaintiffs and against the defendant, be reversed, and that the said District Court of the United States in and for the District of Nevada be directed to grant a new trial of this action, and to take such other steps therein as this Court shall order and direct.

P. G. ELLIS,
208 Boston Building, Salt Lake City, Utah,
Attorney for Defendant.

CHAPTER XXI.

INDEX.

(The numerals refer to sections.)

Actual possession, effect of, 281-289.
Actual possession, defined, 289.
Actual possession, ignored in instructions to jury, 588, 589b.
Adverse claim, 158, 522.
Adverse possession, 113-173.
bars inquiry as to discovery or other acts of location, 141-149.
creates presumption of valid location, 135.
equivalent to mining location, 131-134.
Lavignino vs. Uhlig, 156.
possession and working, 150-155.
purchaser on the record, 152.
testimony, 114, 171-173.
title to mining claims by, 126.
title by adv. possession good without location, 136.
jury instructions, 583.
Adverse suit, nature of, 249.
effect of State Statutes and decisions, 235.
law and equity distinctions, 259.
Amendments to Location Notices, 90, 96, 100.

INDEX—CONTINUED.

(The numerals refer to sections.)

Assignments of error, 629,693.

Numbers:

No. 1, 230, 321, 630.
No. 2, 304, 631.
No. 3, 304, 632.
No. 4, 304, 633.
No. 5, 304, 634.
No. 6, 304, 635.
No. 7, 321, 521, 636.
No. 8, 321, 521, 637.
No. 9, 321,521, 638.
No. 10, 321, 521, 639.
No. 11, 321, 521, 640.
No. 12, 321, 521, 641.
No. 13, 321, 521, 642.
No. 14, 321, 521, 643.
No. 15, 321, 521, 644.
No. 16, 321, 521, 645.
No. 17, 522, 646.
No. 18, 522, 647.
No. 19, 523, 648.
No. 22, 526, 649.
No. 23, 526, 650.
No. 24, 526, 651.
No. 25, 526, 652.

INDEX—CONTINUED.

(The numerals refer to sections.)

Assignment of error continued.

Numbers—Continued.

No. 26, 526, 653.

No. 27, 321, 654.

No. 28, 53, 60, 231, 305, 321, 510, 655.

No. 29, 563, 656.

No. 30, 563, 657.

No. 31, 563, 658.

No. 32, 563, 659.

No. 33, 563, 660.

No. 34, 563, 661.

No. 35, 563, 662.

No. 36, 563, 663.

No. 37, 563, 664.

No. 38, 563, 665.

No. 39, 577, 666.

No. 40, 578, 667.

No. 40a, 579, 668.

No. 40b, 579, 669.

No. 40c, 579, 670.

No. 40d, 579, 671.

No. 40e, 579, 672.

No. 41, 41, 60, 123, 184, 213, 273, 305, 308, 321, 322, 673.

No. 42, 60, 164, 674.

INDEX—CONTINUED.

(The numerals refer to sections.)

Assignment of error continued.

Numbers—Continued.

No. 43, 165, 582, 675.

No. 44, 166, 582, 676.

No. 45, 582, 677.

No. 46, 167, 582, 678.

No. 47, 168, 582, 679.

No. 48, 169, 582, 680.

No. 49, 175, 209, 583, 681.

No. 50, 60, 210, 584, 682.

No. 51, 586, 587, 683.

No. 52, 588, 684.

No. 53, 590, 685.

No. 54, 591, 686.

No. 55, 592, 687.

No. 56, 597, 688.

No. 57, 598, 689.

No. 58, 603, 690.

No. 59, 604, 691.

No. 60, 53, 60, 176, 214, 305, 308, 692.

No. 61, 53, 61, 176, 211, 215, 232, 305, 308, 321, 619, 693.

Subjects:

Complaint, sufficiency of, 630.

evidence relocation Guy Davis claim, 631-635.

INDEX—CONTINUED.

(The numerals refer to sections.)

Assignment of error continued.
Subjects—Continued.
evidence as to adverses, 646-647.
evidence as to deed without Revenue stamps, 648.
evidence as to opinions, 636-641.
evidence as to samples, 642 to 645.
evidence as to veins or lodes, 636-645.
Refusing right of cross-examination, 648-653.
to strike out samples and assays, 651-653.
to strike out testimony, 654.
Overruling non-suit, 655.
Excluding questions and testimony, 656-672.
Belief as to vein or ore body, 658.
Cost of buildings, etc., 661.
Cost of road, 662.
Existence of veins and lodes, 667, 672.
Mining operations, 660.
Payment for labor, 656.
Payment for buildings, 664.
Payment of taxes, 666.
Pay-rolls, 659.
Purpose of mill, 663.
Samples and assays, 668-671.
Scope of development, 667.
Value of buildings, 665.

INDEX—CONTINUED.

(The numerals refer to sections.)

Assignment of error continued.
Subjects—Continued.
Insufficiency of the evidence, 673.
Instructions refused:
Adverse possession, 675-680.
Misjoinder, 682.
Peremptory for defendant, 674.
Trespass, 681.
Instructions given:
Assuming validity of Guy Davis claims, 683.
Entry of junior locator, 684.
Mineral discovery, 684, 686, 687, 688, 689, 691.
Permissive entry by junior locator, 685.
Judgment, 693.
Minimizing prior occupancy and appropriation of ground, 690.
Verdicts, 692.
Willingness to develop, 687.
Attorneys' agreement, 42, 46-50.
lien, 109.
Burden of allegation and proof, 191-199, 203-206, 349-362, 541, 558.
Complaint, 189, 229-270, 230, 312.
set out in full, 234.
averments considered, 241-246.

INDEX—CONTINUED.

(The numerals refer to sections.)

Failure to allege:
vacancy, occupancy, etc., 235.
ouster or detention, 238.
filing of adverse suit, 237.
Nature of adverse suit, 249.
Law or Equity distinctions, 259-264.
Reframing pleadings, 257.

Cross-examination, refusal of, 526.
Citation of cases, 531-539.
Recurrent rulings, 553, 557, 559.

Center line Salt Lake No. 3, 455-457, 467.
Testimony, 469.

Contentions by defendants in error, 61, 86, 157, 316a.

Constructive possession, 297.
ouster, 317.

Copper Canyon:
Photos, 39a, 459, 469.
depth of wash, 469.

Country Rock, character of, 450.
formation, 469.
testimony as to, 451-452, 469.

INDEX—CONTINUED.

(The numerals refer to sections.)

Discovery:
Adverse possession bars inquiry as to, 141-149.
Disagreement among miners, 381.
Error in admitting testimony, 521-525.
General incompetency of evidence, 486-489.
Not in issue, 320.
No proof without allegation, 193, 295, 324.
Location certificates as evidence of, 197.
Lodes and veins, sufficiency, etc., 181.
Panning as test of values, 378.
Pay ore, 182, 385, 389-407, 410-412.
Proof by evidence of existence veins and lodes, 548.
Proof of veins and lodes in vicinity, 549.
Prudence, rule as to, 333.
Purpose of statute requiring, 480.
Reservations concerning inquiry, 320.
Subsequent discovery of mineral, 444, 466.
Testimony, 327-330 (and see Testimony—Veins and Lodes).
Sufficiency of
Citations as to, 182-186, 369-376, 389-407.
Willingness, etc., 484-485, 594-596.
Discovery point, 95, 455-457.
Testimony, 459-465.
Ejectment:
Nature of action, 239.

INDEX—CONTINUED.

(The numerals refer to sections.)

Errors:
Admitting testimony for plaintiffs, 521-525.
as to lodes or veins, 521.
as to relocation of Davis claim, 521.
adverse claim, 522.
deed without revenue stamps, 523-524.
Excluding testimony for defendant, 563-580.
Instructing jury, 586-607.
Refusing instructions, 581-585.
Refusing proper cross-examination, 526.
Estoppel, 98.
Equity rules, 26, 58.
Evidence of plaintiffs:
Insufficiency of as to:
actual possession under lode claims, 281-288.
defined, 289.
constructive possession, 297-300.
ouster or detention, 307.
evidence of, 309-310.
mineral discovery, or no, 486-489.
vacancy, unoccupancy, etc, 272.
Evidence:
Conflicting evidence rule, 432.
Some evidence, rule, 432. (See "Testimony.")
Of discovery by proof of existence of veins and lodes, 548.

INDEX—CONTINUED.

(The numerals refer to sections.)

Exploitation, 483-485, 594.
Exhibits:
B, 101.
C, 102.
Extraction of ore, 485.
Guy Davis Relocation, 40, 112.
Chain of title, 42.
Testimony, 42.
Attorneys' fee agreement, 42, 46-50, 109.
Discovery point, 95.
Estoppel, 98.
Instructions to the Jury:
Refused:
Adverse possession, 581-582.
Trespass, 583.
Misjoinder, 584.
Peremptory, 581.
Given:
Assuming validity Guy Davis relocation, 586.
Submitting invalidity of Salt Lake No. 3, 587.
As to mineral discovery, 588, 590, 592, 598-602-604.
As to permitting entry and relocation, 590.
Assuming conflict of testimony, 591.
As to willingness, etc., 592-596.
As to vacancy or occupancy, etc., 603.
Law as to applicability of, to the evidence, 605-606.

INDEX—CONTINUED.

(The numerals refer to sections.)

Issues, as to:
Adverse possession in defendant, 113.
None as to mineral discovery, 320.
None as to invalidity of Salt Lake No. 3, 190.
Title in plaintiffs to Davis relocation, 40.
Judgment, 619-622.
Location Certificate as evidence, 197, 201.
Lavagnino vs. Uhlig and cases, 156.
Law and Equity, distinctions, 259, 264.
Misjoinder of plaintiffs, 52.
Mining claim as real estate, 200-202.
Mining operations, 482-485.
Motion for new trial, 422b.
Non-suit, 510-520.
Cases supporting, 206.
Notice of Location, 478.
Obliteration of discovery, 347.
Opinions as evidence, 363, 486-491.
testimony as to facts, 367.
Ouster and detention, 307.
averment, none, 238.
actual and physical, 314-315.
constructive, 317-319.
evidence, none, 307-309, 310.
testimony as to occupancy, etc., 309-311.
complaint, 312.
opposing contentions, 316.
plaintiffs' possessions, none, 311.
Presumptions of Law 195, 199, 283, 291, 350

INDEX—CONTINUED.

(The numerals refer to sections.)

Panning as test of values, 378.
Pay ore, etc., 182, 385, 389-407, 410-412.
Placer deposits, 213-225.
belong to owner of surface, 216-220.
testimony, 221-222.
Plaintiffs' status:
no title or right of action, 227-228.
Possession, actual, 281-289.
Possession, constructive, 297-301.
Purchaser on record, 152.
Prudence, rule as to, 333.
Photographs and drawings, 8, 39a, 459, 469, 474.
Relocation, 68, 85, 98.
Notice, 96.
Amended notice, 90, 186-187.
Federal Statutes, 92.
Nevada Statutes, 93, 96, 153, 1-2.
Reframing pleadings, 257.
Relief asked, 112, 170, 212, 226-228, 306a, 319a, 492, 520, 525, 562, 580a, 607, 623-628.
Resume of chapters, 1-5, 227-228.
Revenue Stamps, 45, 51, 532-534, 648.
Salt Lake No. 3:
Title by adverse possession, 113.
Title by mining location, 174.
Testimony, 178.

INDEX—CONTINUED.

(The numerals refer to sections.)

Samples and Assays, 435.

Statement of the Case, 1-39a.

Statutes:

U. S. Rev., Sec. 914, 55.

U. S. Rev., Sec. 910, 247.

U. S. Rev., Sec. 2332, 124.

Nevada Rev., 56, 93, 96, 100-102, 125, 255, 295, 316, 513.

Testimony, In General.

Por plaintiffs, 42, 222, 224, 275-278, 310, 327-330, 367, 377a, 381, 388, 408-409, 436, 469-471, 493-501, 526-527.

For defendants, 115-119, 171, 173, 179-180, 275-278, 309-310, 379, 427-430, 436, 458-465, 469-471, 502-509.

Particulars:

Center line of Salt Lake No. 3, 469.

Country rock, 451.

Cross-examination, 526-527.

Discovery point, 457-459.

Disagreement among miners, 381.

Occupancy of ground, etc., 275-278.

Opinions or conclusions as to veins, 327-330.

Original discovery of mineral on lode claims, 179.

INDEX—CONTINUED.

(The numerals refer to sections.)

Ouster and detention, 307-309-311.
Pay ore, 388, 408-409.
Placer deposits, 221-222, 224, 470.
Possession and working, 171-173.
Rule as to conflicting evidence and some evidence, 436.
Synonims for veins and lodes, 367.
Title to Guy Davis relocation, 42.
Title in defendant:
by adverse possession, 114-121, 171-173.
by mining location, 178-179.
Topography, 469.
Wash, depth of, 469-471.
Veins and lodes, 408-409, 413-416, 494-509.

Where.	Plaintiffs.	Defendants.
In general	494-495	502-503
Center line	496	504
Cut No. 1	436-498, 526-527	427-430
Cut No. 2	436, 498, 526-527	428, 436, 506
Cut No. 3	499, 426-427	507
Discovery point	497	179
Mill cut	436, 500	429, 436, 508
Mill road, cut	501, 436, 526	430-436, 509
Placer shaft	222-224, 470	221

INDEX—CONTINUED.

(The numerals refer to sections.)

Topography, 469.

Trespass, in locating claim, 207, 250-1, 281-350.

Vacancy, Unoccupancy, etc.:

- Averment as to, none, 235.
- Evidence as to, none, 274-279.
- Objection as to, none, 303.
- Testimony, 275-278.

Veins and Lodes:

- After discovered, 444.
- Citations, 181-186, 385-407, 410-412, 369-376.
- Comparisons of plaintiffs' and defendant's testimony, 420-431.
- Country rock character, 450.
- Defendant's evidence, 427-430, 459, 469-471, 502-509.
- Definition of, 181-186, 334, 369-376, 386, 389-407, 411-412.
- Evidence of, in vicinity, 549.
- Existence now, proves discovery, 548.
- Inclusions of wall rock, 369-374.
- Obliteration of discovery, 347.
- Photographs of, 428-429, 447, 459, 469, 474.
- Panning as test of, 378.
- Pay ore, not necessary, 385-407, 410-412.
- Rule as to conflicting evidence and some evidence, 36, 432.

INDEX—CONTINUED.

(The numerals refer to sections.)

Samples and assays compared, 435-538, 441.
Synonims for veins and lodes, 445.
Plaintiffs' evidence, 327-330, 469-479, 493-501.
Verdicts, 122, 608-618.
Wash, depth of, 469-471.

TABLE OF CASES CITED.

(The numerals below refer to the sections of brief.)

Ah Doon vs. Smith.....533
Alford vs. Dewin.....255
Altoona S. M. Co. vs. Integral Min. Co.....129, 133, 162, 251
Ambergris Min. Co. vs. Day.....180a, 356, 398, 453, 480, 548, 549, 594
Anthony vs. Jillson.....133, 236
Armstrong vs. Lower.....70, 400
Atherton vs. Fowler.....281, 285, 286a, 287
Aulls vs. Young.....533
Barklage vs. Russell.....162
Baird vs. Daly.....532
Bartges vs. O'Neill.....54
Banks vs. Graham.....443
Barringer & A. On Mines.....73, 82, 400, 401
Bay State S. M. Co. vs. Brown.....611
Banks vs. Banks.....518
Beaty vs. Wilson.....263
Becker vs. Pugh.....82, 252, 690
Bell vs. Skellicorn.....362
Bennett vs. Butterworth.....261
Bennett vs. Hardkrader.....614
Bennett vs. Reef.....204
Belk vs. Meagher.....70, 72-3, 75, 77, 79, 82, 83, 98, 129, 132, 133, 135a, 139, 145, 153, 156, 200, 218, 281, 298, 300, 306

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Bevis vs. Markland....186, 280, 281, 285, 314, 354, 359, 361, 362, 480
Bismark Mts. G. M. Co. vs. North Sunbeam, etc. Co....127, 148, 158, 162, 180a, 197, 479
Black vs. Mng. Co....200
Black vs. Wabash R. R....533
Blake vs. Powell....532
Bliss Code Pl....204
Boght vs. Gassert....514
Bonner vs. Meikel....351, 393, 398, 400
Borgwardt vs. Oil Co....150, 484
Book vs. Justice Min. Co....181, 184, 281, 337, 356, 369, 374, 389, 391, 393, 398, 399, 400, 403, 411, 445, 479, 595
Bradley vs. Johnson....126
Brown vs. Killabrew....281, 295
Brown vs. Warren....67
Brown vs. Gurney....156
Burke vs. McDonald....252, 389, 400, 401, 610
Buffalo Zinc Co. vs. Crump....128, 135, 147, 148, 149, 152, 162, 397
Calvin vs. McCune....285
Callison vs. Smith....532
Campaus vs. Traub....538
Capitol No. 5 Placer....131
Carey vs. Richmond....533

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Cascaden vs. Bartolis.....182, 333, 398, 404, 549
Castle vs. Womble.....392
Cedar & C. Mng. Co. vs. Norwood.....444
Central Transp. Co. vs. Pullman Pal. Car Co.....517
Charleston vs. Kelly.....182, 333, 404, 595
Chandler vs. Allison.....532, 533
Cheeseman vs. Shreve.....155, 158, 180a, 197
Cheeseman vs. Hart.....135, 144, 147, 149, 162, 180a, 197, 298, 354, 359, 480, 488, 548
Chrisman vs. Miller.....333, 392, 403
Clapper vs. Waterfor.....533
Clark Montana Realty Co. vs. Ferguson.....488
Cleary vs. Skiffish.....161
Clipper Min. Co. vs. Ely Min. Co.....200, 206, 207, 284, 306
Cohn vs. Goldman.....204
Contreras vs. Mack.....265
Con. Wyo. Min. Co. vs. Champion Min. Co.....360, 370, 398
Conn. vs. Oberto.....79
Cook vs. Foley.....263
Copper Globe Min. Co. vs. Allman.....82
Coryell vs. Cain.....292
Costigan on Mining Law.....126, 128, 146, 147, 162
Covenny vs. Hale.....236
Cowan vs. McClay.....159, 160-161
Cowell vs. Lammers.....207, 351

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Craig vs. Thompson 611
Creeds vs. C. C. M. & M. Co. vs. Uinta T. M. & T. Co. 257
Cronin vs. Bear Creek Min. Co. 236
Currier vs. Robinson 533
Cullacott vs. Min. Co. 147
Cunningham vs. Pirrung 193
Cyc. 107, 181, 204, 236, 240, 315, 318, 400, 466, 531, 605, 606
Davis vs. Scott 284
Davis vs. Weibold 351, 480, 489
Davis vs. Dennis 480, 568
Davidson vs. Bordeaux 182, 400
Davidson vs. Calkins 253, 254, 263, 318
Dan vs. Dudley 538
De Bolt vs. Carter 54
Deffeback vs. Hawke 351
Dev. Co. vs. Olmstead 298
Duncan vs. Min. Co. 567
Doggett vs. R. R. Co. 58
Doherty vs. Min. Co. 236
Dower vs. Richards 351
Duggan vs. Davey 398
Durgan vs. Redding 193, 249
Doe vs. Waterloo 218, 251, 360
Enc. Pl. & Pr. 204, 531, 532, 533, 539
Enc. U. S. Supreme Court 203, 204, 537
English vs. Johnson 289, 290, 291
Erhardt vs. Boaro 67, 549

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Erwin vs. Perego.....296, 444
Esterbrook vs. Kessersmith.....54
Eureka Consolidated Min. Co. vs. Richmond.....389, 397
Ewing vs. Burnett.....151
Fenn vs. Holme.....261
Ferris vs. McNally.....228, 264, 266, 366a
Field vs. Tanner.....107
Fletcher vs. Burt.....257
Forbes vs. Gracey.....200, 218
Fosters Federal Pr.....55-8, 260a, 261
Four Twenty Min. Co. vs. Bullion.....128, 162, 249, 251
Fox vs. Myers.....378
Francoeuer vs. Newhouse.....128, 548
Frans vs. Young.....54
Fries-Breslin Co. vs. Bergen.....519
Garfield Min. Co. vs. Hammer.....76, 180a, 197
Gen. Min. Regs. Pars.....141
Gibson vs. Hjul.....444, 479
Gillis vs. Downey.....201
Gilmer vs. Higley.....537
Girard vs. Beach.....54
Glazier Mtn. Min. Co. vs. Willis.....126, 128, 146, 159, 162, 577
Golden Fleece Min. Co. vs. Cable Con. Min. Co.....180a

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Golden vs. Murphy....70, 82, 87, 127, 128, 129, 158a, 200, 350, 356, 371, 391, 396, 479
Goldberg vs. Bruschi....180a, 197
Golden Terra Min. Co. vs. Mahler....298, 400
Goodyear Co. vs. Dancel....263
Goodwin vs. McCable....281, 293
Goodnight vs. Goar....54
Grand Central Min. Co. vs. Mammoth Min. Co....180a, 218, 350, 360, 373, 390, 391, 394, 397, 411, 549
Grear vs. Bank....298
Gropper vs. King....147, 288
Gurney vs. Brown....107
Gwillim vs. Donnellan....51, 218, 252, 610
Hall vs. Kearney....569
Hamilton vs. People....538
Hamilton vs. Min. Co....51
Hanson vs. Craig....589, 589a, 590
Harris vs. Equator Min. Co....128, 129, 133, 135, 135a, 136, 146, 147, 152, 155, 158, 180a, 197, 200, 282
Harrington vs. Chambers....366a, 376, 398, 401, 405, 549
Haws vs. Min. Co....281
Hayes vs. Lavagnino....25, 399
Haynes vs. Ledyard....532, 533, 538
Healey et al vs. Rupp....228, 466, 618
Hess vs. Wender....291, 292

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Hickey vs. Anaconda Copper Min. Co. 154, 160
Hills Cons. Min. Co. vs. Min. Co. 254
Holman vs. Cent. Mont. Co. 52
Hollings vs. Coal Co. 263
Hosmer vs. Duggan. 284
Hosmer vs. Wallace. 284
Houts vs. Gisborn. 249
Horst vs. Shea. 146, 157
Holland vs. Challon. 239
Hopkins vs. Noyes. 82
Hullinger vs. Sespe Oil Co. 325
Humphrey vs. Idaho G. M. Co. 133a
Humphrey vs. Mines Dev. Co. 158
Hughes vs. Devlin. 200
Hyman vs. Wheeler. 389
Iron Silver Min. Co. vs. Cheeseman. 183, 375, 390, 394, 395, 397, 398
Iron Silver Min. Co. vs. Mike & Star Min. Co. 183, 223, 375
Iron Silver Min. Co. vs. Campbell. 355
Jackson vs. Prior Hill Min. Co. 87
Jackson vs. Robb. 620a
Jain vs. Griffin. 204
Jantzen vs. Copper Co. 152, 158, 180a, 197, 548
Jenks vs. Lehman. 443

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Johanson vs. White 298
Jones vs. McMaster
Jones vs. Tunnel Co 373, 615
Johnson vs. Munday 263
Jordan vs. Duke 79
Jupiter Min. Co. vs. Bodie Min. Co. 70, 374, 389, 398, 400, 444, 466
Keeler vs. Trueman 200
Kirk vs. Meldrum 206, 228, 298, 485
Kirchner vs. Laughlin 533
Knox vs. Smith 203
Labbe vs. Corbett 533
Laird vs. Morris 518
Laland vs. McDonald 206, 298
Lange vs. Robinson 181, 333, 350, 398, 403, 480
Langworth vs. Green 532
Lancaster vs. Coale 51
Lackner vs. Sawyer 204
Lavagnino vs. Uhlig 51, 126, 129, 133, 146, 152, 153, 156, 200, 228
Leasure vs. Forquer 204
Lebanon Mng. Co. vs. Cons. R. M. Co. 136, 180a, 202, 252, 282, 283
Lee Dean vs. Teah 620a
Le Doux vs. Forrester 251

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Lindley on Mines....52, 70, 73, 75, 82, 106, 126, 128, 129, 131, 133a, 136, 141, 143, 149, 198-9, 200, 201, 249, 254, 256, 333, 350, 351, 355, 374, 393, 407, 444, 549 592
Litchtenberg vs. Maier....535
Lippord vs. Edwards....54
Little Emily M. C. M. Co....131
Lockhart vs. Farrell, ...156, 281
Lockhart vs. Rollins 79, 483, 484
Lumber Co. vs. Lumber Co. 253, 318
Madison vs. Oil Co. 393, 404
Malone vs. Jackson....298
Malony vs. Adsit....614
Mammoth Min. Co. vs. Grand C. Min. Co.... ....(See Grand Central, etc.)
Manning vs. Strehlew....610
Manuel vs. Wulff 152, 200
Mars vs. Ore Fine Min. Co....251
Marshall vs. Kirtley....252
Mason vs. Min. Co....400, 615
Masters vs. Freeman....54
Mattingly vs. Lewison....251
Mayer vs. People....532
Meeker vs. Harris....204
Merced Min. Co. vs. Fremont....200
Merrit vs. Judd....200

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Meydenbauer vs. Williams 395, 400
Michie vs. Cothberg 333
Mine vs. Bank 538
Minn L. & I. Co. vs. Brasier 146
Min. & Mill. Co. vs. Min. Co 218
Min. Co. vs. Cheeseman ..... (See Iron, Silver, etc.)
Min. Co. vs. Day ..... (See Ambergris, etc.)
Migeon vs. Railway Co ..... (See Ry. vs. Migeon, etc.)
Min. Co. vs. Mahler ..... (See Golden Terra, etc.)
Min. Co. vs. Corcoran ..... (See Overman, etc.)
Min. Co. vs. Rutter ..... (See Shoshone, etc.)
Min. Co. vs. Bullion Mtn. Min. Co. ..... (See Four-Twenty)
Min. Co. vs Murphy ..... (See Golden, etc.)
Min. Co. vs. Hamilton ..... (See Hamilton vs. Min. Co.)
Min. Co. vs. Fitzgerald 360
Min. Co. vs. Debour 51
Min. Co. vs. Champion ..... (See Con. Min. Co. vs. Champion)
Min. Co. vs. Burke ..... (See Providence G. M. Co.)
Min. Co. vs. Perasich 266
Min. Co. vs. Campbell 615
Min. Co. vs. Willis ..... (See Glacier, etc.)
Min. Co. vs. Tinney ..... (See South End Min. Co.)
Min. Co. vs. Strickley 262
Moffat vs. Blue River 192, 206, 228, 298
Moore vs. Thompson 289

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Morrison vs. Marker 263
Morrison vs. Regan 236
Motley Co. vs. Steel Co 257
Moyes vs. Griffith 236
Moyle vs. Bullen 107
Mt. Rosa Min. Co. vs. Palmer 200
Murray vs. Great Western Ins. Co 533
Murphy vs. Golden ..... (See Golden vs. Murphy)
Muldirck vs. Brown 181, 186, 193, 333, 354, 398, 400, 401
McBeth vs. Van Sickle 56
McBrown vs. Morris 281, 284, 286
McCraig vs. Bryan 82, 611
McFeters vs. Pierson 200, 218
McGarrity vs. Byington 484
McGinnis vs. Egbert 135, 135a, 609a, 610, 620a
McMillen vs. Ferrum 228
McShane vs. Kenkle 333, 337, 372, 374, 382, 398, 400, 444, 593, 595
McTarnahan vs. Pike 157
McWilliams vs. Winslow 206, 228, 298
Nash vs. McNamara 156, 281
Nesbit vs. Delmar Min. Co 65
Nessler vs. Bigelow 157
Nev. Rev. Statutes 93, 100, 101, 123, 125, 157, 258, 316, 513, 518

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

New York Iron Mines vs. Negaunee Bank 531
Nickals vs. Winn 281, 284, 287, 295
Niles vs. Kennan 79, 80
North Noonday Min. Co. vs. Orient Min. Co 398
Noyes vs. Mantle 200
Oil & Gas Co 263
Oil Co. vs. Oil Co 281, 285, 398, 400, 403
Oil Co. vs. Miller 239
Omar vs. Soper 79, 228, 282, 300
O'Connell vs. Mines Co 200
O'Donnell vs. Segar 535, 538
O'Reilly vs. Campbell 180a, 197
Overman S. M. Co. vs. Corcoran 398, 400
Parley's Park S. M. Co. vs. Kerr 251
Patterson vs. Hitchcock 252
Patchen vs. Keeley 70
People vs. Dist. Court 51
People vs. Dixon 533
Perdue vs. R. R. Co 533
Perego vs. Dodge 249, 251, 264
Perry vs. Ins. Co 57
Phillips vs. Smith 193, 244, 298
Providence G. M. Co. vs. Burke 70, 73, 75, 79-82
Preston vs. Hunter 251
Quigley vs. Gillett 70, 73, 75, 76

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Railway Co. vs. Kelly.....517
Railway Co. vs. Migeon (See also Migeon vs. Ry.)....357, 398-9, 401, 403, 404
Railroad Co. vs. Goodrich.....263
R. R. Co. vs. Fellenbaum.....519
Reavis vs. Fianza.....126, 148, 149, 153, 162, 267
R. R. Co. vs. Steinberg.....536, 538
Redman vs. Haberstro.....533
Risch vs. Wiseman.....146, 152, 162
Renshaw vs. Switzer.....79, 191, 204
Roseville Alta Min. Co. vs. Iowa Gulch Min. Co.....200
Rourke vs. McNally.....281
Roberts vs. Sou. Pac. R. R. Co.....153
Rosenthal vs. Ives.....610, 620, 620a
Russell vs. Hoyt.....193, 324, 610, 620a, 620
Sanders vs. Noble.....333, 480
Saxton vs. Ferry.....300
Sayres vs. Allen.....533
Sears vs. Taylor.....283
Seeleman vs. Hoagland.....204
Shoshone Min. Co. vs. Rutter....186, 249, 251, 333, 398, 400, 403, 480
Sherman vs. Dilley.....255
Sheiburn vs. Cordova.....261, 263
Sharkey vs. Candiana.....444

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Shattuck vs. Costello 71, 74, 79, 87
Sherlock vs. Leighton 569
Shrever vs. Scott 203
Shreve vs. Min. Co. 182, 185, 351, 374, 376, 400, 404, 405, 409
Schultz vs. Allen 270
Score vs. Griffin 186, 400
Simmons Creek Coal Co. vs. Doran 296
Smith vs. Dowell 347
Smith vs. Ellison 443
Smelting Co. vs. Kemp 218
Snyder on Mines 73, 134, 135a, 138, 142, 145, 149, 183, 249, 250, 360, 390, 395, 398-9, 610, 611, 620a
South End Min. Co. vs. Tinney 130, 157
Southern Cross M. Co. vs. Europa Min. Co. 548, 558, 591
Southern Dev. Co. vs. Enderson 153
Seymour vs. Fisher 147
Smelting Co. vs. Sprann 443
State vs. Adams 533
Strepy vs. Clark 158, 180a, 197
Steele vs. Tanana Mines Co. 220, 333, 350
Stephens vs. Williams 395
Stephens vs. Gill 407
Stewart vs. Rees 162

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Suessenback vs. Deadwood F. N. Bank 200
Sullivan vs. Sharp 107
Sullivan vs. Iron Silver Min. Co 466
Table Mtn. Min. Co. vs. Stranahan 147, 291
Thallman vs. Thomas 281
Thorne vs. Hammond 236
Thompson vs. Richards 532, 538
Thomas vs. Miller 532
Thomas vs. Mackey 204
Thomas vs. Chisholm 610, 611
Trenouth vs. San Francisco 281, 284, 285
Treasury Min. Co. vs. Boss 444
Tunnel Co. vs. Mary Verna Min. Co 333
Turner vs. City 532
Tuolumne Min. Co. vs. Maier 444
Tucker vs. Moreland 203
Tyee Cons. Min. Co. vs. Langstedt 157
Tyee Cons. Min. Co. vs. Jennings 157
Uinta Min. Co. vs. Min. Co 444
Upton vs. Larkin 398
Upton vs. Santa Rita Min. Co 133a, 162, 347

U. S. Rev. Statutes:

Sec. 723 259
" 910 ..... 247, 254, 258, 285, 314

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

" 912 ——— 57

" 914 ——— 55, 518

" 2320 ——— 92, 130, 131, 136, 141, 177, 178, 219, 302 333, 357, 394, 398

" 2324 ——— 139, 145

" 2325-6 ——— 51, 58, 151a, 248, 256, 613, 614, 617

" 2329 ——— 92, 219, 488

" 2332 ——— 113, 123-127, 130-1, 134-6, 138, 141-2-6-9 150, 151a-2-4- -7-8-9, 162-4, 302, 320, 354, 490, 492, 545, 588, 598, 625

" 2333 ——— 219, 357, 488

U. S. Jud. Code ——— 260a

U. S. vs. Min. Co. ——— 351

U. S. vs. Transp. Line ——— 517

Vogel vs. Harris ——— 533

Vogel vs. Warsing ——— 143, 149, 155, 158, 180a, 197, 548

Walsh vs. Mueller ——— 400

Walsh vs. Erwin ——— 148, 162, 347, 577

Walker vs. R. R. Co. ——— 180a, 195

Walker vs. Powers ——— 58

Walton vs. Min. Co. ——— 484

Ware vs. White ——— 81, 135, 139, 140, 145, 148, 180a, 318

Watrous vs. Cunningham ——— 533

Warsing vs. R. R. Co. ——— 548

TABLE OF CASES CITED—CONTINUED.

(The numerals below refer to the sections of brief.)

Weadock vs. Kennedy.....533
Wenner vs. McNalty.....398
Whiting vs. Straup.....444
Whithead vs. Shattuck.....239, 253, 263
Willis vs. Blain.....71, 731, 751, 77, 78, 79, 82, 87, 98
Wilson vs. Wagar.....531-2, 538-9
Willison vs. Ringwood.....191
Wilson vs. Sullivan.....204
Warnekros Paul B. 150
Woffley vs. Lebanon.....51
Yarborough vs. Davis.....533
Young vs. Goldstein.....249, 263-4
Zeiger vs. Dowdey.....87
Zeres vs. Vanina.....73, 75, 79, 83, 87